124-407

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 787.

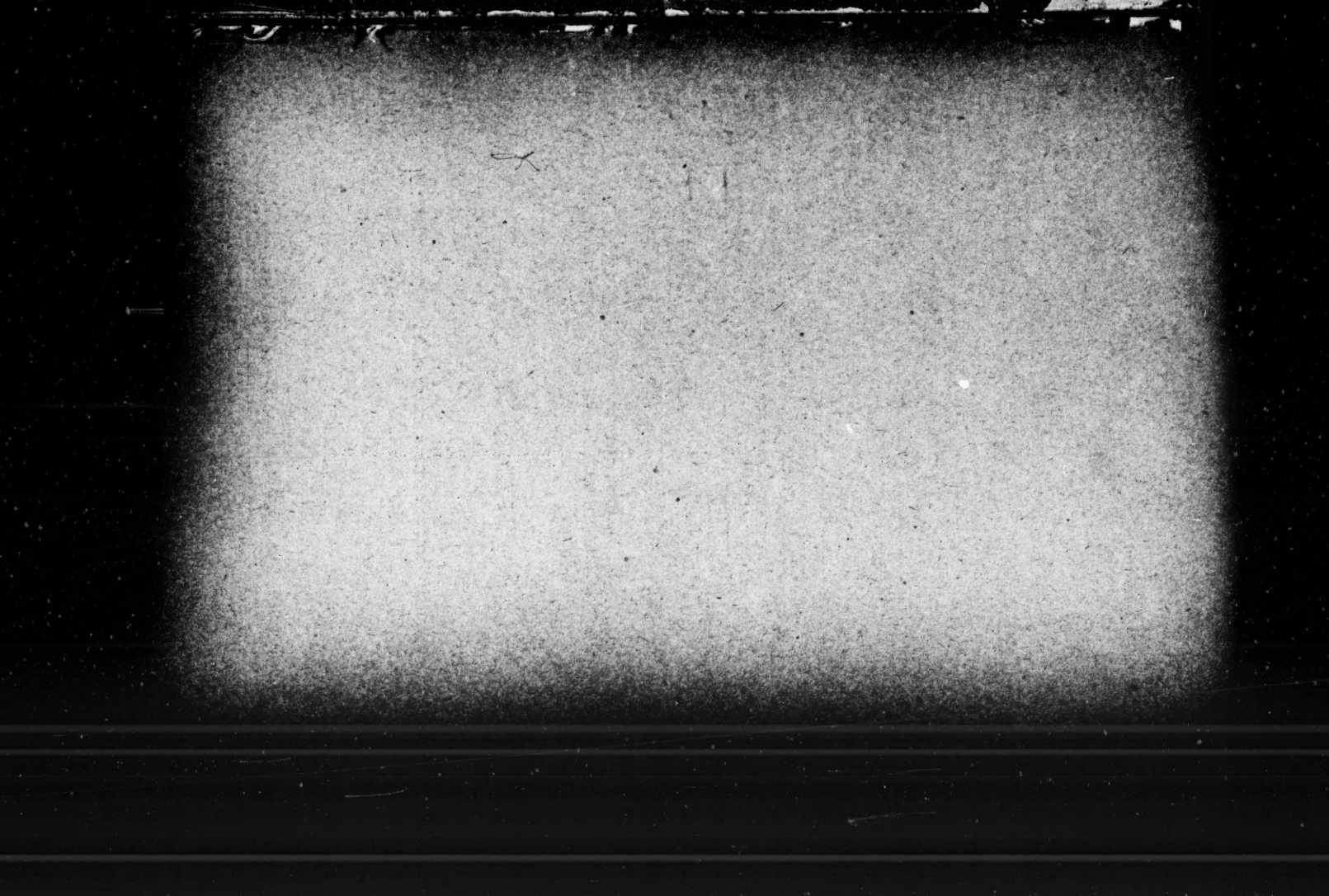
THE UNION INSURANCE COMPANY OF THE CITY OF PHILADELPHIA, PLAINTIFF IN ERROR,

vs.

PATRICK SMITH.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

FILED OCTOBER 16, 1884.



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1 The United States of America to Patrick Smith, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Ohio and eastern division, wherein the Union Insurance Company of the City of Philadelphia is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Martin Welker, district judge of the United States, N. D. O., and one of the judges of said circuit court, this 13th day of April, in the year of our Lord one thousand eight hundred and eighty-six.

M. WELKER,
Dist. Judge U. S.

2 On this fifteenth day of April, in the year of our Lord one thousand eight hundred and eighty-six, personally appeared George Wyman, deputy U. S. marshal for the northern district of Ohio, before me, the subscriber, a commissioner of the circuit court for the northern district of Ohio, and makes oath that he delivered a true copy of the within citation to Patrick Smith, at the city of Cleveland, on said 15th day of April, 1886.

GEO. WYMAN.

Sworn to and subscribed the fifteenth day of April, A. D. 1886.

O. C. BEATTY,
U. S. Commissioner, N. D. O.

Service	2 00
Copy	50
Travel, 2 miles	12
	$2 62

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the northern district of Ohio, Greeting:

Because in the record and proceedings as also in the rendition of a judgment of a plea which is in the said circuit court before you, between Patrick Smith, as plaintiff, and The Union Insurance Company of the City of Philadelphia, defendant, a manifest error hath happened, to the great damage of the said The Union Insurance Company of the City of Philadelphia, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning

the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 13th day of April, in the year of our Lord one thousand eight hundred and eighty-six.

[Seal of the Circuit Court, North'n Dist. of Ohio.]

AUGUSTUS J. RICKS,
Clerk of the Circuit Court of the United States,
Northern Dist. of Ohio, East. Div.

Allowed by—
—— ——.

[Endorsed:] 4336. Patrick Smith *vs.* The Union Insurance Company of the City of Philadelphia. Writ of error.

3½ *Return on Writ of Error.*

UNITED STATES OF AMERICA,
Eastern Division and Northern District of Ohio:

I, Augustus J. Ricks, clerk of the circuit court of the United States within and for said district, do hereby certify that in obedience to the command of the within writ of error the court has duly searched the record and proceedings of said court in the cause aforesaid, and now herewith transmit to the Supreme Court of the United States a full and complete transcript thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said circuit court, at office, in the city of Cleveland, this 9th day of October, A. D. 1886.

[Seal of the Circuit Court, North'n Dist. of Ohio.]

AUGUSTUS J. RICKS, *Clerk.*

And afterwards, to wit, on the 23 day of December, A. D. 1884, there was filed in the clerk's office of said court the following transcript of record from the court of common pleas of Cuyahoga county, Ohio, being in the words and figures following, viz:

4 THE STATE OF OHIO, } *ss:*
Cuyahoga County, }

In Court of Com. Pleas, Ap. Doc. 47.

PATRICK SMITH, Plaintiff,
vs.
THE UNION INSURANCE COMPANY OF THE CITY OF PHILADELPHIA, Defendant. } 25063.

Money only, with attachment.

Be it remembered that heretofore, to wit, at a term of the court of common pleas, begun and held at the court-house in the city of

Cleveland, within and for the county of Cuyahoga and State of Ohio, on the 15th day of Septemper, in the year of our Lord one thousand eight hundred and eighty-four, by and before their honors James M. Jones, John W. Heisley, Gersham M. Barber, Edwin T. Hamilton, Henry M. Kinney, and Edwin J. Blandin, judges of the court of common pleas of the fourth judicial district of the State of Ohio.

And thereupon, on the 5th day of November, A. D. 1884, there was duly filed in said court a certain petition in this cause, which is in the words and figures following, to wit:

Petition.

In the Court of Common Pleas, Cuyahoga County, Ohio.

PATRICK SMITH, Plaintiff,

vs.

THE UNION INSURANCE COMPANY OF THE CITY OF PHILADELPHIA, Defendant.

Petition for money only.

The said plaintiff, Patrick Smith, complaining of the said defendant, says that said defendant is a corporation organized under the laws of Pennsylvania and engaged in the business of marine insurance in the State of Ohio and elsewhere.

Plaintiff further says that he now is, and was on the 6th day of May, A. D. 1884, the owner of the tug N. P. Sprague, said tug being then engaged in plying on Lake Superior, Michigan, Huron, St. Clair, Erie, and Ontario and the river St. Lawrence to Quebec, and upon said date the said defendant, by its written policy, then and there entered into and, in consideration of the premises therein expressed to be paid by this plaintiff, did insure said tug N. P. Sprague to the amount of seven thousand dollars, from noon of the 6th day of May, 1884, to noon of the 10th day of December, 1884, against the perils of the lakes, rivers, canals, fire, & jettisons that should come to the damage of said vessel during the continuance of said policy, which said policy so issued by said defendant is hereunto attached, marked "Exhibit A" and made a part of this petition.

Plaintiff further says that during the continuance of said policy, to wit, on the 18th day of July, 1884, the said vessel N. P. Sprague in its regular course of business left Port L'Anse, bound thence for the port of Cleveland, and that the said vessel was then stout, staunch, & strong and in all respects seaworthy for the voyage she was about to undertake; that while on said voyage and before the completion thereof, to wit, on the 23rd of July, 1884, and without fault or negligence on the part of this plaintiff or those in charge and management of said tug, but solely by reason of the perils of navigation so insured against by the defendant as aforesaid, the said vessel sprung a leak, and although the plaintiff and his agents and the officers in charge of said vessel used all reasonable endeavors

to prevent said vessel filling with water they were unable so to do, and within a short time after the discovery of said leak the vessel filled with water and sank, and then & there became a total loss; that promptly thereafter, to wit, on or about the 24th day of July, 1884, this plaintiff caused proof of said loss to be made to the
6 defendants, in all respects as required by the provisions of said policy, and on or about said date, in compliance with the terms of said policy in case of abandonment and a claim for a total loss, plaintiff caused to be made to the defendant an assignment and bill of sale and transfer of all and every interest which he had in said tug, and made a claim upon the defendant for the amount of seven thousand dollars, as provided by said policy in case of a total loss, which said abandonment and transfer of said vessel was then and there accepted by said defendant.

Plaintiff further says that he has fully complied with all the terms and the conditions of said insurance policy by him to be performed, and has made due demand upon the defendant to pay him the sum of seven thousand dollars, as provided in said policy, but that the defendant has hitherto refused and still refuses to pay the same or any part thereof, whereby a cause of action has accrued to this plaintiff to have and demand of said defendant the sum of seven thousand dollars, with interest from the 24th day of July, 1884. Wherefore the plaintiff prays judgment against the said defendant for the sum of seven thousand dollars, with interest from the 24th day of July, 1884.

BURKE, INGERSOLL & SANDERS,
Pr Pff.

THE STATE OF OHIO, } ss:
Cuyahoga County, }

James Cunnea, being duly sworn, says that he is the duly authorized agent of the above-named plaintiff in the above-entitled action, and that the facts stated in his foregoing petition are within the personal knowledge of this affiant and are true, as he verily believes.

JAMES CUNNEA.

Subscribed by said Patrick Smith in my presence and by him sworn to before me this 5th day of November, A. D. 1884.

[SEAL.] JOHN BIGGS,
Notary Public.

7 Tax: Notary fee, 40 cents.

Precipe.

PATRICK SMITH
vs.
THE UNION INSURANCE COMPANY OF THE CITY OF PHILADELPHIA.

Please issue summons for the above-named defendant; am't claimed, $7,000, & int. from July 24th, 1884; also writ of attachment and garnishee process to Scott & Berriman, an Ohio partnership.

BURKE, INGERSOLL & SANDERS.

Said policy referred to in the foregoing petition as "Exhibit A" and made a part thereof is in the words and figures following, to wit:

Ex. "A."

No. 157. Lake Hull. $7,000.00.

Sum insured, $7,000.

The Union Insurance Company of Philadelphia, by this policy of insurance on account of P. Smith, loss, if any, payable to assured, does make insurance and cause seven thousand dollars to be insured upon the body, tackle, apparel, and other furniture of the tug called the N. P. Sprague from noon of the 6th day of May, 1884 (the said vessel being warranted by the assured to be then in safety), to noon of the 10th day of November, 1884, unless sooner terminated or made void by conditions hereinafter expressed; warranted by the assured to be employed exclusively in the freighting and passenger business and to navigate only the waters, bays, harbors, rivers, canals, and other tributaries of Lakes Superior, Michigan, Huron, St. Clair, Erie, and Ontario and river St. Lawrence to Quebec, usually navigated by vessels of her class, during the portion of the life of this policy between noon of April 1st and noon of November 30th, and between noon of November 30th and noon of April 1st ensuring said vessel shall be laid up and safely moored satisfactorily to this company.

8 Vessel valued at $9,334.

And said vessel, tackle, apparel, and other furniture are valued at ninety-three hundred thirty-four dollars without any further account to be given by the assured to the assurers for the same. Touching the adventures and perils which the said insurance company is content to bear and take upon itself by this policy, they are of the lakes, rivers, canals, fires, jettisons that shall come to the damage of the said vessel or any part thereof, excepting all perils, losses, misfortunes, or expenses consequent upon and arising from or caused by the following or other legally excluded causes, viz: Damage that may be done by the vessel hereby insured to any other vessel or property; incompetency of the master or insufficiency of the crew or want of ordinary care and skill in navigating said vessel and in loading, stowing, and securing the cargo of said vessel; rottenness, inherent defects, overloading, and all other unseaworthiness; theft, barratry, or robbery; charges, damage, or loss in consequence of a seizure or detention for or on account of any illicit or prohibited trade, or any trade in articles contraband of war; any claim for wages or provisions furnished to officers or crew while the property insured may be detained by any disaster or during subsequent repairs, excepting always services rendered in protecting, recovering, and securing the vessel or property covered by this policy; anchors being cast without being properly or sufficiently

buoyed; gangwarp and openings through the deck being improperly or insecurely secured or protected.

[On the margin:] Full lake and harbor tarring and wrecking privileges granted. Permitted to navigate during life of policy.

Rate, 6.85 per cent.; prin., $479.50.

The assurer hereby acknowledges the receipt of a note, due November 1st, 1884, for the amount of the consideration of this insurance, which, at the rate of $6.85 per cent. on $7,000, is $479.50.

9 In case of loss or misfortune it shall be lawful and necessary to and for the assured, his agents, factors, servants, and assigns, to give the assurer prompt notice of the disaster and submit the plan adopted for recovering and saving the property, and to make all reasonable exertions in and about the defence, safeguard, and recovery of the said vessel or any part thereof, without prejudice to this insurance, and after recovery and the holding of a survey by persons chosen by the insurer and insured or its agent, made under oath, setting forth the particulars of actual damage received by the vessel in the disaster, and discriminating between those and former defects and wear and tear, the insured are to cause the same to be forthwith repaired in accordance with the surveyors' specifications; and in case of neglect or refusal on the part of the insured, his agents or assigns, to adopt prompt and efficient measures for the safeguard and recovery thereof or to repair the same when recovered, then the said insurer may and is hereby authorized to interpose and recover the said vessel, or after discovery to cause the same to be repaired, or both, for account of the insured, to the expenditures and amount whereof the said insurance company will contribute according to the proportion the sum insured bears to the valuation aforesaid, and the surplus (if any) paid or incurred by said insurer (with the premium note, if unpaid) shall be a lien upon and shall be recovered against the said vessel, tackel, apparel, and other furniture or any part thereof, or against the insured, at the option of the insurer; but in case this insurance shall be against total loss only, and no claim for same be sustained, then the whole of such expenditures and amount paid or incurred by said insurer

10 shall be a lien and recoverable as aforesaid, and in all cases of loss or damage one-third new for old shall be deducted from the amount of actual cost of repairs or estimate for the same (except on anchors), and no partial loss or particular average shall in any case be paid by the insurer unless its amount of the whole of such damage or loss (after deducting one-third new for old) equals or exceeds 9 per cent. of the valuation aforesaid. Each passage from port to port shall *shall* be subject to its own separate average.

Particular average, 9 per cent.

Boiler clause.—Unless caused by stranding, collision, or the vessel being on fire, the insured warrants this policy to be free from any claim for loss or damage to boilers, steam-pipes, or machinery caused by the bursting, explosion, collapsing, or breaking of the same, and

to be free from any and every general average and salvage expense in consequence thereof, excepting always the expenses of getting the vessel from an exposed position to the nearest place of safety, when further expenses of above nature are not to be a claim on the insurer. It is agreed that the acts of the insured or insurer or its agent, in recovering, saving, and preserving the property insured, in case of disaster, shall not be considered a waiver or an acceptance of an abandonment, nor as affirming or denying any liability under this policy; but such acts shall be considered as done for the benefit of all concerned, and without prejudice to the rights of either party.

Further, the insured shall not have a right to abandon the vessel, in any case, unless the amount which the insurer would be liable to pay under an adjustment as of a partial loss shall exceed half the amount insured, nor shall detention by the season or by any other cause be alleged or allowed as cause for abondonment.

11 Moreover, no abandonment in any case whatever, and even when the right to abandon may exist, shall be held or allowed as effectual or valid unless it shall be in writing, signed by the insured, and delivered to the said company or to its authorized agent; nor unless it shall be efficient, if accepted, to convey to and to invest in the said insurance company an unincumbered and perfect title to the subject abandoned, and the valuation of said vessel, expressed in this policy, shall be considered the value in adjusting losses covered by this policy. Losses shall be payable in sixty days after proofs of such loss or damage, and of the amount thereof and proof of the interest of the assured shall be made and presented at the office of said company (the amount of the premium or note for premium on this policy, if unpaid, and all other indebtedness due this company being first deducted). It is also agreed and understood that in case of loss or damage under this policy the assured, in claiming and accepting payment therefor, hereby and by that act assigns and transfers all his or their right to claim for such loss or damage as against any person or persons to the company; to insure to his benefit, however, to the extent only of the amount of the loss or damage and attendant expenses of recovery paid or incurred by this company; any act of the assured waiving or transferring, or tending to defeat or decrease any such claim against any person or persons shall be a cancellation of the liability of this company for or on account of the loss or damage claimed, and the expenses of recovery or otherwise (if any) paid or incurred by the said company shall be a lien upon and shall be recoverable against the said vessel, tackle,

12 apparel, and other furniture or any part thereof, or against the insured at the option of insurer.

Limit of insurance, $7,000.

It is also agreed that this policy shall become void if any other insurance is or shall be made upon the vessel interest hereby insured which, together with this insurance, shall exceed the sum of seven thousand dollars. It is also agreed that all claims under this policy shall be void unless prosecuted within one year from the date of the loss, and in case the notes or obligations given for the pre-

mium herefor or any part thereof be not paid at maturity the full amount of premium shall be considered as earned and this policy becomes void while said past-due notes or obligations or any part thereof remain overdue and unpaid. It is also agreed that in all cases when carrying grain cargoes in bulk the vessel hereby insured shall have the same secured by good and sufficient shifting-boards properly and securely put in place so as to effectually prevent the shifting of the cargo, and that no sail vessel shall load or unload off the shores or piers located on the shores of any of the lakes without special permission endorsed on this policy. The interest of the assured in this policy or any part thereof, or in the property hereby insured or any part thereof, is not assignable unless by consent of this company manifested in writing, and in case of transfer or termination of any such interest of the assured or any change of the nature of the insurable interest of the assured in the property aforesaid, either by sale or otherwise, without such consent, this policy shall from thenceforth be void and of no effect, and no assignment or transfer shall in any case relieve the insured or property
13 hereby insured from any or all of the conditions therein expressed, and a violation of or non-compliance with any of such conditions, either by the assignee or by the assignor, before or after the assignment or transfer, shall vitiate this policy.

N. B.—This policy is subject to the usuages and regulations of the ports of New York and Buffalo on all matters of adjustment and settlement of losses not herein otherwise clearly specified and provided for, to be stated by a competent adjuster of marine losses designated by the insurer. This policy shall not be binding until countersigned by Crosby & Gunning, agent- of this company at Buffalo.

In witness whereof the president of the Union Insurance Co. of the City of Philadelphia has hereunto subscribed his name and caused the same to be attested by its secretary this 6th day of May, A. D. 1884.

C. HIESKELL, *President.*
JNO. B. CRAVEN, *Secretary.*

Countersigned by—
CROSBY AND GUNNING,
Gen'l Agents.

(Edition B.)

Said policy is endorsed as follows, to wit:

The Union Insurance Company of Philadelphia to P. Smith. Vessel, tug N. P. Sprague. Valuation, $9,334. Limit of insurance, $7,000. Amount insured, $7,000, at 6.85 per cent., $479.50. Commenced May 6th, 1884. Expires Dec. 10, 1884. Scott & Berriman, agents at Cleveland, O.

Said petition is endorsed as follows, to wit:

In Cuyahoga com. pleas. Patrick Smith, pl'ff, *vs.* The Union Insurance Company of the City of Philadelphia, defendant. Petition for money only. Burke, Ingersoll & Sanders, att'ys for pl'ff.

And thereupon, on the 5th day of November, A. D. 1884, there was duly filed in said court a certain affidavit in this cause, which is in the words and figures following, to wit:

Affidavit.

THE STATE OF OHIO, } ss:
Cuyahoga County, }

14 In the Court of Common Pleas.

PATRICK SMITH, Plaintiff,
vs.
THE UNION INSURANCE COMPANY OF THE CITY OF PHILADELPHIA, Defendant.

James Cunnea, being duly sworn, says he is the duly authorized agent of above-named plaintiff, Patrick Smith; that he has this day commenced in the above-named court an action against the above-named defendant, The Union Insurance Company of the City of Philadelphia, to recover the sum of seven thousand dollars, with interest from the 24th day of July, 1884, now due and payable to said Patrick Smith from the said defendant on account of an insurance policy issued said Patrick Smith by said defendant on the 6th day of May, 1884, by which the said defendant did insure the tug N. P. Sprague in the sum of seven thousand dollars, from the 6th day of May, 1884, to the 10th day of December, 1884, against the perils of navigation upon the Lakes Superior, Michigan, Huron, St. Clair, Erie, & Ontario, and the rivers & canals and tributaries to said lakes; and that said tug was on or about the 23rd day of July, 1884, while upon a voyage on Lake Erie and during the continuance of said policy, by reason of the perils of navigation so insured against in said policy, lost and abandoned, to the damage of said plaintiff, Patrick Smith, in the sum of seven thousand dollars, as stipulated in said policy; that he, said Patrick Smith, has fully performed all the terms and agreements of said policy upon his part to be performed, and has made due proof of loss and a demand upon the said defendant for the amount of said policy, which demand has been refused.

Affiant further says that the said claim is just, and that
15 there is now justly due to said Patrick Smith upon said cause of action from the said defendant the sum of seven thousand dollars, with interest from the 24th day of July, 1884, and that he justly ought to recover that amount therefor from said defendant.

Affiant further says that the said above-named defendant, The Union Insurance Company, is a foreign corporation, organized under the laws of the State of Pennsylvania, and a non-resident of the State of Ohio.

Affiant further says that he has good reason to believe and does verily believe, and therefore states the fact to be, that the firm of Scott & Berriman, a partnership organized under the laws of the State of Ohio and doing business therein, and resident of Cleveland, Ohio, has property and money belonging to said Union Insurance Com-

pany in its possession and under its control, and that said firm of Scott & Berriman is indebted to said Union Insurance Company in an amount unknown to this affiant.

And further he saith not.

JAMES CUNNEA.

Subscribed by said Patrick Smith in my presence and by him sworn to before me this 5th day of November, A. D. 1884.

JOHN BIGGS, [SEAL.]
Notary Public.

Tax, notary fee, 40 cents.

Said affidavit is endorsed as follows, to wit: In Cuyahoga common pleas. Patrick Smith, pl'ff, *vs.* The Union Insurance Company of the City of Philadelphia, def't. Affidavit.

And thereupon, on the 5th day of November, A. D. 1884, there was duly issued from said court a certain summons in this cause, which is in the words and figures following, to wit:

Summons.

THE STATE OF OHIO, } *ss:*
Cuyahoga County, }

To the sheriff of Cuyahoga county:

You are commanded to notify The Union Insurance Company of the City of Philadelphia that it has been sued by
16 Patrick Smith in the court of common pleas, of Cuyahoga county, and that unless it answer by the 6th day of December, A. D. 1884, the petition of the said plaintiff against it filed in the clerk's office of said court such petition will be taken as true, and judgment rendered accordingly. You will make due return of this summons on the 17th day of November, A. D. 1884.

Witness Henry W. Kitchen, clerk of said court, and the seal thereof, at the city of Cleveland, this 5th day of November, A. D. 1884.

HENRY W. KITCHEN, *Clerk,*
[SEAL.] By F. SEIGER, *Deputy Clerk.*

Said summons is endorsed as follows, to wit: Cuyahoga common pleas. Patrick Smith *vs.* The Union Insurance Company of the City of Philadelphia. Summons in action for the recovery of money only. Amount claimed, $7,000.00; for which, with interest from the 24th day of July, 1884, judgment will be taken if you fail to answer. Returnable Nov. 17, 1884. Burke, Ingersoll & Sanders, plaintiff's attorneys.

And thereupon, on the 5th day of November, A. D. 1884, there was duly issued from said court a certain order of attachment in this cause, which is in the words and figures following, to wit:

Order of Att'm't.

THE STATE OF OHIO, *Cuyahoga County:*

Court of Common Pleas of Cuyahoga County.

PATRICK SMITH, Plaintiff,
against
THE UNION INSURANCE COMPANY OF THE CITY OF PHILADELPHIA, Defendant.

To the sheriff of Cuyahoga county:

You are commanded to attach and safely keep the lands, tenements, goods, chattels, stocks or interests in stocks, rights, credits, moneys, and effects of the above-named defendant in your county not exempt by law from being applied to the payment of the above-named plaintiff's claim, or so much thereof as will satisfy the
17 said plaintiff's claim for seven thousand dollars, with interest from July 24th, 1884, and fifty dollars, the probable cost of this action. You will make due return of this order on the 17th day of November, A. D. 1884.

Witness my signature and the seal of said court, at the city of Cleveland, this 5th day of November, A. D. 1884.

HENRY W. KITCHEN, *Clerk,*
[SEAL.] By F. SEIGER, *Deputy Clerk.*

Said order of attachment is endorsed as follows, to wit: Cuyahoga common pleas. Patrick Smith *vs.* The Union Insurance Company of the City of Philadelphia. Order of attachment. Scott and Berriman, garnishees. Burke, Ingersoll & Sanders, plaintiff's attorneys. Returnable Nov. 17, 1884.

And thereupon, on the 7th day of November, A. D. 1884, the sheriff duly returned said order of attachment with his return thereon endorsed as follows, to wit:

Order Rel'd.

THE STATE OF OHIO, } *ss:*
Cuyahoga County, }

Pursuant to the command of this order I did, on the 5th day of November, A. D. 1884, at the hour of 10.05 o'clock a. m., of said day, serve this writ on the within-named The Union Insurance Company of the City of Philadelphia by delivering a certified copy thereof to W. B. Scott, an agent for said company in this county. I also, on the same day, at the hour of 2 o'c. & 55 min. p. m., served a like copy of this writ on Scott & Berriman, garnishees, by delivering the same, together with a notice to appear and answer as garnishees in

this cause, as by law provided, to W. B. Scott, one of the members of said firm of Scott & Berriman, at the usual place of doing business of said firm. No goods or chattels, lands or tenements, of said defendant found that I could attach.

E. D. SAWYER, *Sheriff*,
By BYRON POPE,
Deputy Sheriff.

Sheriff's fees, $1.64.

And thereupon, on the 7th day of November, A. D. 1884,
18 said sheriff duly returned said summons with his return thereon endorsed as follows, to wit:

Sum's Ret'd.

THE STATE OF OHIO, } ss:
Cuyahoga County, }

On the 5th day of November, 1884, I served this writ on the within-named The Union Insurance Company of the City of Philadelphia by delivering a certified copy thereof to W. B. Scott, an agent in this county for the said insurance company, no other officer of said company being found.

E. D. SAWYER, *Sheriff*,
By BYRON POPE, *Dep.*

Sheriff's fees, .94.

And thereupon, on the 3rd day of December, A. D. 1884, there was duly filed in said court a certain petition for removal in this cause, which is in the words and figures following, to wit:

Petition to Remove to United States Circuit Court.

THE STATE OF OHIO, } ss:
Cuyahoga County, }

In the Court of Common Pleas.

PATRICK SMITH, Plaintiff,

vs.

THE UNION INSURANCE COMPANY OF THE CITY OF PHILADELPHIA.

The defendant, the said Union Insurance Company of the City of Philadelphia, now comes and files this its petition to remove this cause and action from the court of common pleas of Cuyahoga county, Ohio, where the same is now pending, to the circuit court of the United States for the northern district of Ohio, and for cause and reason therefor states the following, to wit:

First. The plaintiff was, at the commencement of this action and still is, a resident and citizen of the county of Cuyahoga and State of Ohio.

Second. The said defendant herein is a corporation duly and legally incorporated under and by virtue of the laws of the State of

Pennsylvania, and was, at the time of the commencement of this action and now is, a citizen of that State and was not then and is not — a citizen of the State of Ohio.

19 Third. The matters in controversy in this suit are wholly between citizens of different States, and the matters in dispute, exclusive of costs, exceed the sum of five hundred dollars and the suit is to recover the sum of seven thousand dollars, with interest.

Fourth. That this cause has not yet been tried, and that there has been no term of the court of common pleas of Cuyahoga county, Ohio, held since the commencement of this suit at which the same could be tried.

Fifth. That defendant is ready and willing to give a bond, with good and sufficient surety, for the doing of all acts and things required of it by the provisions of law upon the removal of a cause from a State court into the circuit court of the United States, and herewith offers such bond, conditioned and executed as aforesaid.

Wherefore defendant prays that said bond may be accepted as good and sufficient surety according to the said provisions of law, and that the said suit may be removed into the circuit court of the United States for the northern district of Ohio, and that no further proceedings be had therein in this court.

HARVEY D. GOULDER,
Attorney for Defendant.

THE STATE OF OHIO, }
Cuyahoga County, } *ss:*

Harvey D. Goulder, being duly sworn, says that he is the duly authorized attorney herein of the said defendant, and is a citizen and resident of the State of Ohio, and that he believes the allegations of the foregoing petition for removal to be true.

HARVEY D. GOULDER.

Sworn to before me by the said Harvey D. Goulder and by him subscribed in my presence this 18th day of November, A. D. 1884.

CHAS. TAYLOR, [SEAL.]
Notary Public.

Said petition is endorsed as follows, to wit: The State of
20 Ohio, Cuyahoga common pleas court. Patrick Smith *vs.* The Union Insurance Company of the City of Philadelphia. Defendant's petition for removal to the circuit court of the United States for the northern district of Ohio. Harvey D. Goulder, defendant's attorney.

And thereupon, on the 3rd day of December, A. D. 1884, there was duly filed in said court a certain bond in this cause, which is in the words and figures following, to wit:

Bond.

THE STATE OF OHIO, } ss:
Cuyahoga County, }

In the Court of Common Pleas.

PATRICK SMITH, Plaintiff,

vs.

THE UNION INSURANCE COMPANY OF THE CITY OF PHILADELPHIA, Defendant.

Know all men by these presents that we, W. B. Scott and George Berriman, of Cleveland, in the county of Cuyahoga and State of Ohio, *and* held and firmly bound unto Patrick Smith, of the said county of Cuyahoga, Ohio, in the sum of five hundred dollars, lawful money, to be paid to said Patrick Smith, his successors or assigns; to which payment, well and truly to be made, we bereby bind ourselves, our heirs, executors, and administrators, by these presents.

The condition of this bond is such that whereas the said Patrick Smith did, on the 5th day of November, A. D. 1884, file his petition in the court of common pleas of Cuyahoga county, Ohio, against the said Union Insurance Company of the City of Philadelphia to recover the sum of seven thousand dollars, with interest thereon from the 24th day of July, A. D. 1884; and whereas the same is now pending in said court of common pleas and the said Union Insurance Company of the City of Philadelphia, defendant in said action, has this day filed its petition in said court of common pleas
21 to remove said action from said court of common pleas of Cuyahoga county, Ohio, to the circuit court of the United States for the northern district of Ohio:

Now, if the said defendant, The Union Insurance Company of the City of Philadelphia, shall enter in said circuit court, on the first day of its next term, a copy of the record in said suit so commenced by the said Patrick Smith, and shall pay all costs that may be awarded by the said circuit court if the said circuit court shall hold that this suit has been improperly or wrongfully removed thereto, and shall there appear and enter special bail in the said suit, and shall do or cause to be done such other appropriate acts as by the acts of Congress providing for the removal of causes from the State courts to the circuit courts of the United States may be required to be done by it, then the above obligation is to be null and void; otherwise to be and remain in full force and effect.

Witness our hands and seals, at Cleveland, Ohio, this 2d day of December, A. D. 1884.

W. B. SCOTT. [SEAL.]
GEORGE BERRIMAN. [SEAL.]

Said bond is endorsed as follows, to wit: Cuyahoga common pleas. Patrick Smith *vs.* The Union Insurance Company of the City of Philadelphia. Bond for removal to U. S. circuit court. Harvey D. Goulder, defendant's attorney.

Journ., 89–306.

The defendant having filed its petition for the removal of this cause to the next circuit court of the United States within and for the northern district of Ohio, and the same having been heard and considered and the court being satisfied of the truth of the allegations thereof, and the said defendant offering its bond in the
22 sum of five hundred dollars, with W. B. Scott and George Berriman as *his* sureties, for entering in said circuit court, on the first day of its next session, a copy of the record of this case, and also for its then appearing according to law, which bond, with sureties, is hereby accepted and approved, therefore it is ordered that the said plaintiff, Patrick Smith, do no further prosecute this suit in this court, and that the same be removed into the said circuit court, according to the act of Congress in such case provided.

The plaintiff's costs in this cause are taxed at $5.40. The defendant's costs in this cause are taxed at $11.81.

23 *Certificate to Common Pleas Record.*

THE STATE OF OHIO, } *ss:*
Cuyahoga County, }

I, Henry W. Kitchen, clerk of the court of common pleas within and for said county, and in whose custody the files, journals and records of said court are required by the laws of the State of Ohio to be kept, hereby certify that the foregoing copy is taken and copied from the records, vol. 234, page 599, of the proceedings of the court of common pleas within and for said Cuyahoga county, and that said foregoing copy has been compared by me with the original record, and that the same is a correct transcript thereof.

In testimony whereof I do hereto subscribe my name officially and affix the seal of said court, at the court-house in the city of Cleveland, in said county, this 8th day of December, A. D. 1884.

[Seal Common Pleas Court of the County of Cuyahoga, Ohio.]

HENRY W. KITCHEN, *Clerk,*
By J. H. KUZEL, *Deputy Clerk.*

I, E. T. Hamilton, presiding judge of the court of common pleas within and for the fourth judicial district of the State of Ohio, in which district is said county of Cuyahoga, do hereby certify that Henry W. Kitchen was, at the date of the above certificate and now is, clerk of said court of common pleas within and for said Cuyahoga county and State of Ohio, and that said clerk is the officer in whose custody said original record is required to be kept by the laws of the State of Ohio, and authorized by the laws of the State of Ohio to certify as aforesaid, and that said attestation to said copy of said record is in due form of law.

Signed by me and dated at Cleveland, Cuyahoga county, Ohio, this 8th day of December, A. D. 1884.

E. T. HAMILTON,
Judge as Aforesaid.

[Endorsed:] Cuyahoga common pleas. Patrick Smith *vs.* The Union Insurance Co. of the City of Philadelphia. Copy of record. Filed.

24 And afterwards, to wit, on the 3rd day of February, A. D. 1885, the following answer was filed in this cause in said court, viz:

Answer.

Circuit Court of the United States, Northern District of Ohio, Eastern Division.

PATRICK SMITH, Plaintiff,

vs.

THE UNION INSURANCE COMPANY OF THE CITY OF PHILADELPHIA, Defendant.

Now comes the said defendant, and for answer to plaintiff's petition herein admits its incorporation and business; admits the character and general occupation of the tug N. P. Sprague; admits that defendant insured Patrick Smith in the sum of seven thousand dollars on said tug, and that it issued the policy which is attached to plaintiff's petition in this case, and defendant denies each and every allegation in said petition contained not herein expressly admitted to be true.

2nd defense. And by way of further answer and for a second defense defendant says that said tug, while on Lake Huron, was rendered helpless and unseaworthy and in great danger of springing aleak and sinking by the breaking of her shaft, a part of her machinery, which breaking was not caused by stranding, collision, or the vessel being on fire, and was compelled to and did abandon the vessel which she then had in tow; and while in such helpless, unseaworthy, and perilous condition said tug was picked up and towed to Port Huron, a place of safety and a port of repair, where every facility and convenient means of repairing said tug
25 were at hand; yet defendant avers that said tug was not there repaired, but without the knowledge or consent of defendant said tug, in the same helpless and unseaworthy and dangerous condition before described, was towed out of and past said port of Port Huron, and was afterwards towed in the same condition into and through and past the port of Detroit, at which last-named place every facility and all conveniences existed for repairing said tug, and which also was a place of entire safety; and without any notice to defendant and without its knowledge and consent, the said tug being then and at all times hereinbefore mentioned in the possession and control of plaintiff and his agents, said tug was in such helpless and unseaworthy and dangerous condition towed out

upon Lake Erie, not in any manner navigating as a tug or by or with the aid of her own machinery and appliances, and soon after reaching Lake Erie, without any stress of weather, the said tug sprung aleak and was sunk.

3rd defense. And for a further and third defense the defendant says that while said tug N. P. Sprague was on Lake Huron, having in tow several vessels, part of her machinery, to wit, her shaft, broke, the said breaking not being caused by stranding, collision, or the vessel being on fire, whereby said tug was completely disabled, and was compelled to and did give up her said tow, and was rendered unseaworthy and helpless, and was in great and constant peril of springing aleak and sinking by the working of her propeller wheel and broken shaft attached thereto; and in that condition she was picked up and, by direction of her master, towed to Port Huron, Michigan, which was a place of safety and at which every facility and convenient means for repairing said tug in all respects were at hand, but the plaintiff negligently failed and neglected to repair or cause to be repaired
26 said tug, and negligently and without the knowledge or consent of the defendant caused her to be towed out of and away from said port of safety and repair in the unseaworthy and dangerous condition above described; and afterwards, in the same condition, said tug was towed into and through and past the port of Detroit, a place of safety, where every means and facility for repairing said tug was at hand and convenient; yet the plaintiff, not regarding his duty in that behalf, negligently failed to repair or cause to be repaired the said tug and permitted her, in the unseaworthy, helpless, disabled, and dangerous condition before described, to be towed out of Detroit river and out upon Lake Erie; that soon after reaching the lake and meeting with a slight and ordinary swell the said tug, by reason of her said broken machinery and by reason of her said unseaworthiness and helpless and dangerous condition, sprung a serious leak and soon after was sunk.

And defendant says that by reason of the premises the plaintiff never had and ought not to have any cause of action or claim against it, this defendant, for or growing out of the matters set out in his said petition.

Wherefore defendant prays that it may be hence dismissed with its costs.

By HARVEY D. GOULDER,
Defendant's Attorney.

NORTHERN DISTRICT AND STATE OF OHIO, } ss:
Cuyahoga County, }

Harvey D. Goulder, being duly sworn, on his oath says that the said defendant is a foreign corporation; that he is the duly authorized attorney therefor; that the foregoing answer is true as he is informed and believes.

HARVEY D. GOULDER.

27 Sworn to before me by the said Harvey D. Goulder and by him subscribed in my presence this 2nd day of February, A. D. 1885.

O. C. BEATTY,
U. S. Com'r, N. D. O.

And afterwards, to wit, on the 3rd day of February, A. D. 1885, the following answer of garnishee was filed in this cause in said court, viz:

Answer of Garnishee.

Circuit Court of the United States, Northern District of Ohio, Eastern Division.

PATRICK SMITH, Plaintiff,

vs.

THE UNION INSURANCE COMPANY OF THE CITY OF PHILADELPHIA, Defendant.

Now come W. B. Scott and George Berriman and for answer as garnishees herein state that they are, and at the time the writ in this cause was served they were, partners in business at Cleveland under the name and style of Scott and Berriman; that as such firm they had in their possession and control the sum of $3,349.21 belonging to the said defendant, for which defendant company said firm was local agent at Cleveland; that they did not have, and since that time have not had, in their possession or under their control any other money, property, or rights in action of any kind belonging to said defendant, and were not, and have not since been, indebted to said defendant in any sum whatever, except as agents having in possession the aforesaid sum of $3,349.21, and not otherwise.

W. B. SCOTT,
GEORGE BERRIMAN,
By HARVEY D. GOULDER,
Their Attorney.

28 NORTHERN DISTRICT AND STATE OF OHIO, } *ss:*
Cuyahoga County, }

W. B. Scott, being duly sworn, on his oath says that he is a member of said firm of Scott and Berriman; that he knows the contents of the foregoing answer, and that the same are true.

W. B. SCOTT.

Sworn to before me by the said W. B. Scott and by him subscribed in my presence this 2nd day of February, A. D. 1885.

[SEAL.] CHAS. TAYLOR,
Notary Public.

And afterwards, to wit, on the 17th day of June, A. D. 1885, the following demurrer was filed in this cause in said court, viz:

Demurrer to 2nd Defense of Answer.

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

PATRICK SMITH *vs.* UNION INSURANCE COMPANY.

The plaintiff now comes and demurs to the 2nd defense of the defendant's answer, because, he says, it does not state facts sufficient in law to constitute a defense to the cause of action alleged in the petition.

Wherefore plaintiff prays judgment, &c.

BURKE, INGERSOLL & SANDERS,
Att'ys for Pl'ff.

And afterwards, to wit, on the 19th day of October, A. D. 1885, the following reply was filed in this cause in said court, viz:

29 *Reply.*

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

PATRICK SMITH, Plaintiff,

vs.

THE UNION INSURANCE COMPANY OF THE CITY OF PHILADELPHIA, Def't.

And now comes the plaintiff, and for reply to the third defense set forth in the answer of defendant says:

This plaintiff admits that while the tug N. P. Sprague was on Lake Huron, having in tow several vessels, a part of her machinery, to wit, her shaft, broke, whereby said tug was compelled to and did give up her said tow and was rendered helpless, and was in this condition by the direction of her master towed to Port Huron, Michigan, which was a place of safety; that said master caused her to be towed away from Port Huron to and past Detroit, which was also a place of safety; and that soon after reaching Lake Erie, on her way to Cleveland, she sprung a leak and soon after sunk, but this plaintiff denies all and singular the allegations in said third defense contained, except those hereinabove admitted.

BURKE, INGERSOLL AND SANDERS,
Att'ys for Pl'ff.

THE STATE OF OHIO, }
Cuyahoga County, } *ss:*

Personally came Patrick Smith, who, upon being duly sworn, says that he is the plaintiff in this action, and that he believes the statements of the foregoing reply to be true.

PATRICK SMITH.

Subscribed and sworn to by said Patrick Smith before me this 19th Oct., 1885.

O. C. BEATTY,
U. S. Com'r, N. D. O.

30 And afterwards, to wit, on Thursday, the 22nd day of October, being a day of the October term, A. D. 1885, of said court, the following order was entered in said cause in said court, viz:

Demurrer Sustained.

PATRICK SMITH
vs.
THE UNION INSURANCE COMPANY OF THE CITY OF PHILADELPHIA.

This day came on this cause to be heard upon the plaintiff's demurrer to the second defense of the answer herein, and the same was argued by counsel, and thereupon, upon consideration, it is ordered that said demurrer be sustained.

And afterwards, to wit, on the 18th day of February, A. D. 1886, and on each of the days following, all being days of the February term, A. D. 1886, of said court, the following proceedings were had in said cause, viz:

Trial of Case. Jury Empanelled.

PATRICK SMITH, Plaintiff,
vs.
THE UNION INSURANCE COMPANY OF THE CITY OF PHILADELPHIA, Def't.

THURSDAY, *February 18th*, 1886.

This day came the parties, by their attorneys, and a jury, being called, come, to wit, H. H. Gragg, Daniel Harm, C. V. Heminway, David Skeels, John Nelson, M. A. Day, Charles Frantz, George C. Underhill, Egbert Hutchinson, John Shelley, Joseph P. Ball, and Edward Morehouse, who, being elected, were duly impanelled and sworn to well and truly try the issue joined between the parties at bar. The plaintiff's testimony was begun but not closed,
31 when the further trial of this case was postponed until to-morrow.

FRIDAY, *February 19th.*

This day again came the parties, by their attorneys, and came also the jury as heretofore empanelled and sworn herein, and the trial of this cause proceeded; the plaintiff's testimony was closed, and the defendant's testimony was begun but not closed, when the further trial of this case was postponed until to-morrow.

SATURDAY, *February 20th.*

This day again came the parties, by their counsel, and came also the jury as heretofore impanelled and sworn herein, and the trial of this case proceeded; the defendant's testimony was continued but not closed, when the further trial of this cause was postponed until Monday next.

MONDAY, *February 22nd.*

This day again came the parties, by their counsel, and on account of the absence of one of the jurors in this case the further trial of this case was postponed until to-morrow.

TUESDAY, *February 23rd.*

This day came the parties, by their counsel, and C. V. Heminway, one of the jurors impanelled and sworn herein, being sick and unable to further serve as such juror, it is agreed by counsel in open court that the further trial of this case may proceed with the remaining eleven jurors, and thereupon the trial proceeded; the testimony was closed and arguments of counsel begun but not closed when further proceedings were postponed until to-morrow.

WEDNESDAY, *February 24th.*

This day again came the parties, by their counsel, and
32 came also the jury as heretofore empanelled and sworn herein, and the trial of this cause proceeded; the arguments of counsel were concluded, and the jury, having received their instructions from the court, retired for deliberation in charge of the marshal, and after a time said jury come again into court and for verdict say:

Verdict.

"We, the jury in this case, being duly impanelled and sworn, do find for the plaintiff, and we do assess his damages *to* the sum of seven thousand five hundred sixty-nine and $\frac{33}{100}$ dollars ($7,569.33).

JOHN NELSON, *Foreman.*"

And afterwards, to wit, on the 27th day of February, A. D. 1886, the following motion was filed in this cause in said court, viz:

Motion for New Trial.

Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

PATRICK SMITH, Plaintiff,

vs.

THE UNION INSURANCE COMPANY OF THE CITY OF PHILADELPHIA, Defendant.

Now comes the said defendant and moves the court here to set aside the verdict heretofore rendered in this cause and for a new trial of the same, for the following reasons:

1. That said verdict is against the law of the case.
2. Said verdict is against the evidence in the case.
3. Said verdict is against the weight of the evidence of the case.
4. That the court erred on the trial of this cause in admitting testimony on the part of plaintiff, objected to by defendant at the time; to which ruling defendant then excepted on the trial.

5. That the court erred on the trial of this cause in excluding testimony offered by defendant; to which ruling defendant at
33 the time excepted.

6th. That the court erred on the trial of the said cause in refusing the several written requests to charge the jury presented to the court by the defendant, and to which refusals the defendant excepted, as to each of said requests.

7. That the court, on the trial of this cause, erred in the charge to the jury in the respects pointed out in the exceptions to said charge made by defendant at the time and in the charge as a whole; to which defendant then excepted.

8. That the court erred on the trial in refusing defendant's request to charge the jury to find a verdict for defendant.

9. That the court erred in the trial of said cause in overruling defendant's motion to take the case from the jury at the close of plaintiff's testimony.

10. That the court erred on the trial in refusing and overruling defendant's motion to take the case from the jury and direct a verdict for defendant at the close of the testimony on both sides.

11. For misconduct on the — plaintiff's counsel in arguing to the jury substantially as follows:

"The insurance was up to November 30th. The vessel was lost July 23rd, and the insurance company is unfair because it presented the note Nov. 10th and compelled plaintiff to pay unearned premium from July 23rd to November 30th, making plaintiff pay insurance for over four months from the time she was lost and not at risk, being four months of unearned premium the company required plaintiff to pay after the loss."

Such argument being made over the objection and exception taken at the time by defendant.

12. For errors of law occurring on the trial of said cause.

By HARVEY D. GOULDER,
Deft's' Attorney.

34 And afterwards, to wit, on the 23rd day of March, A. D. 1886, the following supplemental motion was filed in said cause, viz:

Supplemental Motion for a New Trial.

In the Circuit Court of the United States, Northern District of Ohio.

PATRICK SMITH, Plaintiff,

vs.

THE UNION INSURANCE COMPANY OF PHILADELPHIA, Defendant.

Now comes the said defendant, by its attorney, and moves the court for a new trial in this cause for the following reasons:

That the defendant has discovered new and material evidence in this cause of which it was entirely ignorant until after the verdict herein had been rendered and the time for filing a motion for a new trial had expired.

By HARVEY D. GOULDER,
Defendant's Attorney.

And afterwards, to wit, on the 25th day of March, A. D. 1886, being a day of the February term of said court, A. D. 1886—present, the Honorable Martin Welker, district judge—the following proceedings were had in this cause, viz:

Judgment.

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

PATRICK SMITH
vs.
THE UNION INSURANCE CO. *et al.* } Law. No. 4336.

35 This day came the parties, by their counsel, and came on to be heard the defendants' motion to set aside the verdict of the jury rendered herein at a former day of this term and for a new trial of this case, which was argued by counsel; and upon consideration it is ordered that said motion be overruled, and thereupon, upon motion of the plaintiff, it is ordered and considered that the plaintiff, Patrick Smith, have and recover from the defendant, The Union Insurance Company of the City of Philadelphia, the sum of seven thousand five hundred and sixty-nine and $\frac{33}{100}$ dollars ($7,569.33), the sum so as aforesaid found to be due by the jury, with interest from the first day of this term, together with the costs of this suit, to be taxed at $ —, for which execution may issue.

And it appearing to the court from the answer of W. B. Scott and George Berriman, filed herein, as garnishees, on the 3rd day of February, A. D. 1885, that they have in their possession as partners doing business under the firm name of Scott and Berriman, and as such partners are indebted to the defendant, The Union Insurance Company of Philadelphia, in the sum of three thousand three hundred forty-nine and $\frac{21}{100}$ dollars ($3,349.21), and that said sum is held by them as agents of said defendant and is now due and payable to said defendant and liable to be applied under the garnishee proceedings herein, it is therefore ordered that the said W. B. Scott and George Berriman, partners as aforesaid, do pay to the clerk of this court the said sum of $3,349.21 within ten days from this date, and in default thereof it is ordered that an execution be issued against said garnishees to collect said sum of $3,349.21, as upon a judgment; and thereupon come- the defendant and tendered its bill of exceptions, which is signed and sealed and ordered to be made a part of the record in this case.

36 And afterwards, to wit, on the 25th day of March, A. D. 1886, the following bill of exceptions was filed in this cause in said court, viz:

Bill of Exceptions.

Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

PATRICK SMITH, Plaintiff,

vs.

THE UNION INSURANCE COMPANY OF THE CITY OF PHILADELPHIA, Defendant.

Be it remembered that at the trial of this case in the circuit court of the United States for the northern district of Ohio, eastern division, before the Honorable Martin Welker, presiding judge, and a jury, and at the February term, A. D. 1886, of said court, the plaintiff, Patrick Smith, to maintain the issue on his part, introduced and offered in evidence the following testimony, to wit:

JOHN BOWEN, called on behalf of the plaintiff, being sworn, testified as follows:

Been a resident of Cleveland about forty-four years; engaged in the navigation of the lakes and waters adjacent here about twenty or twenty-one years, off and on; was captain of this tug about three weeks—from the time she went out in the spring until she was lost.

Q. Before that had you sailed her at all?

A. I made two or three trips the fall before that up to Kelley's Island; — was all. Mr. Smith, the owner, was captain then; I was mate, pilot, wheelman, or something; I steered.

Q. Had you anything to do with this tug or other tugs around the harbor here before beginning to sail her?

37 A. Oh, I had run a tug a week or so at a time—that is all—when I would not be doing anything else.

Q. For how long a time had you done that—anything before the previous season?

A. No, sir.

Q. Then I understand you had occasionally taken a tug for a few days around the harbor here before?

A. Yes, sir; for a few days or a week.

Q. Do you remember having anything to do with the tug Cushing at any time?

A. I ran her awhile from here to Put-in Bay a few weeks; that was in 1884, before taking this boat. I don't remember the number of trips; I never kept any track of that; didn't make many.

Q. Where did you start, on this trip, to come back, when the accident happened?

A. At L'Anse, on Lake Superior. The accident happened the third day down—July 21st; had three vessels in tow—the Baldwin, the Selkerk, and the Cook; they were loaded with ore. We took the same vessels up, loaded with coal.

Q. What was the condition in which your tug was, as to being — seaworthy condition or not, at this time?

A. Good condition up to the 21st.

Q. How many men had you on board at that time to assist you?

A. There were eleven or twelve men—two wheelmen, watchman, two deckhands, two engineers, two firemen, mate, and cook.

Q. What do you say as to the tug being supplied with all the men that were needed to handle her properly?

A. She was.

Q. What is the fact about the condition in which her machinery was, as far as you could see and judge, when she started?

A. As far as I know anything about it, it was in good shape; I don't know anything about her machinery.

Q. Whether it was in condition to tow them?

A. It was; she towed them along, anyway.

Q. When you started to come back, on the 18th, from L'Anse, how far had you come on your way before the accident befell you?

38 A. I think it was about eight miles off Pt. Au Barques, coming down on Lake Huron, 75 or 80 miles from the foot of the lake.

Q. How much of a trip had you made on Lake Superior?

A. It was about 160 miles, I should judge; I never paid much attention. Then we came on down through the river Sault St. Marie with our tow.

Q. What time in the day did this accident happen?

A. Between one and two o'clock in the afternoon.

Q. How did you first learn of the breaking of the shaft?

A. It woke me up; it was in the mate's watch.

Q. Whereabouts did the shaft break, with reference to the hull of the boat—within the hull or outside of it?

A. In the hull; the point where the shaft left the hull of the boat was below the water line.

Q. How much larger was the opening that let the shaft through there than the diameter of the shaft itself; how much play, as they call it, was there on either side of the shaft before any packing was put in at all?

A. I don't know; I never packed one. I went there at the time this occurred. I should not think there was more than half to three-quarters of an inch; there might have been more; I didn't stop to measure it.

Q. What did you find the condition of things after being waked up and going to examine where it was broken?

A. We found the aft part of her leaking pretty bad; the partitions broken there—where the shaft had broken.

Q. Was any water coming in the vessel there?

A. Very little water coming in.

Q. Who went with you, if any one, there to attend to what should be properly done at that time, or what was done?

A. The engineer went down there with me—the first engineer;

I cannot think of the name just now. I say there was a little
39 water coming in; I went and got some pieces of quilt, I guess it was, and wrapped around it, and screwed up the gland a little bit, and that stopped it; stopped it all but a little bit of a stream that was not much bigger than your finger that was coming in between the gland, on the lower side of it—coming through the stuffing-box, I suppose they call it.

Q. What difficulty, if any, did you have in stopping it up?

A. None at all; only just took that piece of cloth and wrapped right around it and tightened up the gland a little.

Q. Had you any means of moving the boat after that was done?

A. No, sir.

Q. What became of your tow—the vessels you had in your tow?

A. They were all scattered around there; I got her alongside the Selkirk so as to lay there until I got a tug to tow me. I should judge about three hours before I got a tug—between two and three hours.

Q. What tug come then?

A. The Wilcox; I don't know the captain's name. I made arrangements with him to tow us.

Q. What position did you occupy in the tow, then, from that time on?

A. The stern—the last boat; I guess we got straightened up about five o'clock, between five and six in the evening; reached Port Huron the next morning between six and seven, I guess it was.

Q. Had you any acquaintance of any kind at Port Huron?

(Objected to, objection overruled, and defendant excepted.)

A. I was not acquainted at all there.

Q. What was the real condition of the boat when you got there, at Port Huron?

A. In good shape—all but just her shaft; nothing ailed her.

Q. What was her condition as to leaking?

A. Not leaking to amount to anything; not any more than the whole trip around.

Q. You mean she did not leak any more than she usually leaked even when her shaft was whole?

A. Yes, sir.

Q. You may state to the jury whether you had the pumps
40 working, or siphons as they are called, for carrying out water that might accumulate in the hold?

A. Yes, sir; the siphons was working when it was necessary; it was not necessary to work them all the time or half the time. I believe there was three siphons.

Q. Explain to the jury how the siphon differs from a pump.

A. It is blowed out, the water is, with steam with a siphon; the pump lifts it, forces it.

Q. Did you continue to work your engine?

A. It was stopped just as soon as it could be stopped after it was broken, just as soon as the engineer could get there. She was not working afterwards, not that I know of. We operate the siphons

with steam from the boiler; took steam right from the boiler. We kept our fire up for the sake of furnishing this steam until the water put it out.

Q. Do you remember what time you reached Detroit?

A. It was between four and five o'clock p. m. when we went by Detroit; I won't be certain.

Q. What was her condition when you came past Detroit?

A. Just the same as it was when we came into the river there; good condition, making no water.

Q. What do you say as to its being good seamanship and prudent to bring her through to Cleveland at that time?

(Objected to, objection overruled, and defendant excepted.)

A. I think it was on my part.

Q. What interference, if any, with bringing her through did the condition of her shaft make to bringing her through to Cleveland?

(Objected to, objection overruled, and defendant excepted.)

A. Hadn't made any that I know of.

Q. Under whose watch was the care of the boat—yours or the mate's—from the time you left Detroit?

A. My watch on deck until 12 o'clock; then I left her in
41 the mate's care. I had then got down into Pigeon Bay, about 20 miles from the mouth of the Detroit river. It is all bay all the way there. It is on the Canadian side. We had got out of the mouth of the river and about twenty miles in Pigeon Bay, some distance from the shore, heading for Cleveland.

Q. What was the condition in which the boat was when you turned her over to the mate?

A. It was in good condition. I went to bed then, and next I heard the fireman growling about the water around his feet; he could not do——

(Objected to, objection overruled, and defendant excepted.)

Q. What did you then do when you heard the growling about the water about his feet?

A. I got up and went downstairs, down on the main deck. I found the fireman down there trying to scoop up coal to keep up the fire. He did not stay but a very few minutes; the water chased him out.

Q. What did you do then, if anything, towards examining the boat; did you make any examination of the boat?

A. No, sir; I went to blow for the other tug to come back.

Q. Well, did you know anything about what the condition of the boat was at this time?

A. Not right away.

Q. How soon did you go there?

A. Perhaps fifteen minutes.

Q. So you did go there and examine the condition of the stern of the boat where the shaft went out?

A. I did.

Q. What did you find the condition of things there?
A. Found it just as I had left it—all right.
Q. You then blew a signal for the Wilcox?
A. Yes, sir; two long whistles.
Q. You may state whether she responded to you on your first call or whether you had to call more than once.
A. She answered me on the first call.
42 Q. What was the condition of things when the Wilcox came alongside?
A. When she came alongside the first time I was down below; down forward to see if I could find the leak.
Q. What did you have in forward there under her deck?
A. Coal, away forward—fuel.
Q. What amount of coal did you carry there when you started out of port?
A. Forty-five or fifty tons down in the hold. There was in there at that time, I should judge, about twenty or twenty-five tons.
Q. What did you find the condition of the water there when you went down in there in connection with the coal?
A. Well, it was about ten or twelve inches there over the fire-hole, and in the forecastle it was probably two feet over the floor.
Q. When the tug came along, what then?
A. The tug came along and all got off of her; all hands got off my vessel into the tug, and then they blowed their whistle and I came on deck and got ashore. It was dark. They missed me, I suppose, when they got there; didn't find me.
Q. Were there any other men in your crew left on the tug Sprague when you left her to go on the Wilcox?
A. No, sir; I was the last man.
Q. What occurred there after that?
A. We laid around there and watched her to see if she was going to go down, and what she was going to do, for a few minutes.
Q. Now describe what sort of a hole there was in her.
A. There was about two feet of water in the forecastle over the forecastle floor.
Q. How big was the hole? Could you tell anything about it?
A. I could not find it. If I could I might have stopped it.
Q. Now, what do you say, in your judgment, as to the practicability of bringing her through to Cleveland at that time?
43 A. It was useless to try it.
Q. After you got onto the Wilcox, what was done then?
A. I went to the captain and asked him if he would tow her into shallow water. He says, "I will if anybody will steer her." I says, "I will go and steer her." He ran up close to me, throwed me a heavy line; I hauled it aboard; made it fast and went aboard and steered her. I don't know the exact time I was aboard steering her; it was not very long. He went towards the shore, within a half a mile; may be closer; as close as he dared to go. When he blowed the whistle I ran down, let go the line, went aft, and got into the boat and let her go.

Q. Which way, at that time, was the drift of the waves, if there was any?

A. Right onto the beach. It was a pretty good sea—a pretty nice little sea.

Q. What then did you do after leaving her?

A. Came right over to Cleveland just as fast as I could come.

(By the COURT:)

Q. Where did the boat go down—a half a mile from shore?

A. No, sir; she drifted right along in towards the beach until she struck. The wind blowing pretty hard, she was not long making a landing place.

Q. Well, what was done, if anything, towards removing any of her furniture after you and the men were waked up—removing their clothing or anything of that kind?

A. I don't know whether there was any furniture removed.

Q. How far out from the shore was she when you left her?

A. When I got off her she could not have been more than a quarter of a mile of the beach.

Q. It had got to be late in the morning, had it not?

A. Yes, sir.

Q. When the Wilcox came along side of the Sprague, while she was filling with water there, what is the fact about your
44 men getting off your boat onto the Wilcox—whether they took time to go back and get their things or whether they got off in a hurry?

A. I don't know; they went while I was below. I don't know how they got there—anything about it.

Cross-examination by Mr. GOULDER:

Q. Where did you get breakfast that morning?

A. Aboard the Wilcox, after our vessel had been abandoned.

Q. After she had been towed in?

A. It must have been after seven, I guess; they had all been to breakfast there.

Q. How long after you got off your tug the last time did you have breakfast?

A. After I got off her it must have been a half or three quarters of an hour—getting back on the boat and washing and tinkering around.

Q. What time did you blow your whistle to the Wilcox?

A. That was about two o'clock in the morning. I should judge about that. I did not take a look at my watch. There was no clock in my room when I came out.

Q. After the blast of that whistle how long were you below on your tug?

A. I was down there fifteen or twenty minutes.

Q. How long did the tug Wilcox tow on you in towards the shore?

A. Oh, I should judge about an hour.

Q. You say after blowing the whistle you went down below and stayed fifteen or twenty minutes and then came on deck. Now, how

many hours from that time until the Wilcox took your line to tow you into the beach?

A. About three or four hours; I guess three hours.

Q. And during that three or four hours you were on board the Wilcox, were you?

A. Yes, sir; I was aboard the Wilcox; might have been 5 or 6 hundred feet from the Sprague; didn't stay right along-
45 side of her.

Q. How did you get from the Sprague to the Wilcox?

A. I jumped. I should judge she was about seven or eight feet away then.

Q. There was not any difficulty in her coming up to within six or eight feet of your vessel, was there?

A. There was not anything very safe about it. There was no difficulty just at that time.

Q. How did you get back to the Sprague from the Wilcox?

A. I went in the boat. Then she ran up within the heaving line's distance—probably 30 or 4- feet; throwed the heaving line and hauled it aboard the Sprague.

Q. Now, during the three or four hours that you lay there with the Wilcox close to the Sprague, what effort was made to save the furniture, or anything of that kind, from the Sprague?

A. There was not any.

Q. When you got off the Sprague and went in the boat to the Wilcox, a quarter of a mile from the shore, or such a matter, was the Sprague still afloat?

A. Yes, sir; just about afloat, and that was all.

Q. What signal was it you blew at 2 o'clock that morning?

A. Two long whistles.

Q. When did you arrange that should be the signal of danger?

A. When he took hold of me on Lake Huron.

Q. You had arranged then, in case of danger, you should blow two long whistles, and then he should drop everything and come immediately to you, had you not?

A. Yes, sir.

Q. When you went on board the Sprague after having been on the Wilcox, did you go below?

A. Yes, sir; I walked through her; had to go through her to make the line fast, in the first place.

Q. Did you do anything else down there?

46 A. Not on her decks; no.

Q. How were the dead-lights of the vessel?

A. They were closed, until I went down and opened them—opened one. I opened the starboard dead-light just before I left her.

By Judge INGERSOL:

Q. Explain about a dead-light.

A. It is a little round window to let light down in the hold of the tug, about six inches, I should think, in diameter. When the dead-light was open it made a hole six inches in diameter.

By Mr. GOULDER:

Q. Did you have papers for running a tug?

A. I have first-class mate and pilot's papers, & will bring them here.

Q. Do you know anything about who was on the deck of your vessel from 12 to 2 o'clock that morning?

A. It was the mate, second engineer, and wheelsman. I don't know any more than I left them there—no more than any other man would know when he leaves a deck; he leaves it in charge of another man, and he supposes that man is there.

Q. Did you sound your pumps after the accident on Lake Huron?

A. I didn't have no pumps to sound.

Q. Had no pumps at all?

A. No; could lift up the floor in the cabin aft and see her whole bottom. I did this after the accident. The water was just over the floor. There was not any more than there was there right along all the time when she was so much astern—no more than usual.

Q. How large a hole was that before you plugged it up with quilts and left a stream of water coming in as large as your finger—how large was it before that?

A. Probably as big as all two of my fingers in the first start.

Q. Before you plugged it up that left a stream as big as a finger; how large was the stream?

A. Probably as big as two or three of my fingers between the stuffing box and the shaft where the stuffing box is in the
47 stern pipe. The stern post is a piece of timber running up and down there at the stern of the boat.

Q. There is a hole made through that stern post and the stern pipe goes through that?

A. The shaft goes inside of the stern pipe.

Q. Did you not say to the captain of the Wilcox that you were leaking there and you did not know how it would go, or words to that effect?

A. No, sir.

Q. And did you not then arrange with him for a signal of two long blasts that should be a danger signal, and just as soon as he heard that he should come back to you?

A. I done that—arranged a signal.

Q. Now, right in connection with that, did you not tell him your stearn pipe was cracked—broken?

A. No, sir.

Q. What did you say as to the reason for arranging for this danger signal? Did you tell him anything as the reason?

A. No, sir.

Q. And without giving him any reason at all for such special urgency you arranged a signal, on the receipt of which he was just to let go and come around there to you?

A. I said if anything happened I will blow you two long whistles.

Q. You made an arrangement with him by which he was to drop you either at Port Huron or Detroit, did you not?

A. Provided I wanted to. He was to let go, if I wanted to, any place I wanted to drop off. It was my privilege to do it. I was behind. He was to tow the whole four through for so much for the whole tow; so I could drop off if I felt like it.

Q. On Lake Huron did you go below at 12 o'clock at night when your watch on deck was off?

A. Yes, sir. I went below and went to sleep. I came on deck again about half past five. I was then down pretty close to Port Huron.

Q. Now, when you went by Port Huron what examination of the tug did you make?

A. I went down through aft to see if the stern pipe was all right—to see if there was any water coming in. There was not any more than there had been right along; not more than an inch
48 over her floor.

Q. Now, you say you are not acquainted at Port Huron; what do you mean by that?

A. I mean I don't know anybody in Port Huron.

Q. Were there two dry docks there then?

A. I guess there was.

Q. Were they in plain view from the river?

A. Yes, sir.

Q. Are there machine shops there?

A. I don't know exactly about that; I was not around looking for machine shops; I never had no occasion for it.

Q. Do they build or repair vessels there?

A. I don't know about the machinery part; I know they do the wood-work.

Q. How is it at Detroit? You were not asked about that.

A. There is machine shops at Detroit.

Q. Now, you know more lake tugs are owned in Detroit than in all the other ports on the lakes put together, do you not?

A. Suppose I do know; what of it? I guess there would not be any more.

Q. Do you know that those tugs are repaired at Detroit?

A. Sometimes; and sometimes they get repaired here.

Q. You know that they do repair them at Detroit and have facilities for repairing any tugs, do you not?

A. Yes, sir.

Q. You know they had three dry docks, at cart, then, did you not? You knew there was every facility for repairing your tug, did you not?

A. Yes, sir.

Q. How was your vessel trimmed? Where did she draw most water?

A. Aft.

Q. Now, you say that things were broken aft; what was broken?

A. The partition in between the two rooms that was aft; the wheelman's room and the cook's room were right over the break—away back aft, over the run; probably twenty feet from the stern;

take on deck over all, about twenty feet; it would be probably ten or twelve feet forward of the stern post.

Q. What had broken those partitions?

A. I suppose the spring of the shaft. There was a piece of
49 timber, probably eight inches thick, went right across the top from run to run and starboard to port; I don't know what it was there for; I could not tell you. Then right over the shaft there was an upright piece that went up under the floor; whether it went there to hold the floor there or not I don't know, but when that shaft broke the spring broke this here thin partition; i- breaking the shaft there must have been some spring; I can't tell what caused that spring; there must have been some spring to break that, certainly; it punched it right up.

Q. How old was that tug?

A. Twenty-seven years, I believe; twenty-six or twenty-seven; I won't be certain which.

Q. Your testimony is that she was in usually good condition?

A. It was as good as it had been all the season.

Q. How good was that?

A. Good enough to go through the lake; good enough for fellows to bet money on.

Q. Do you not know that vessel was not in good condition any time you were in it?

A. No.

Q. Do you not know her timbers were rotten?

A. No; I don't know her timbers were rotten, for I never examined her.

Q. Can you say they were not?

A. I could afterwards; after she broke I could find out.

Q. Was she rotten or not?

A. I did not know it at the time; not until I went down there to see about the breaking, and then I saw she was a little soft.

Q. By that you mean she was rotten there in the run?

A. She was a little soft in the run.

Q. You mean by that the wood was rotten?

A. Certainly.

Q. You say a little soft; I want to know what you mean?

A. Rotten.

Q. What were you watching for three or four hours, lying alongside near this boat down in Pigeon Bay, or down in that neighborhood?

A. To see how she would act; she was floating in Pigeon Bay.

50 Q. Can you tell anything more definitely than Pigeon Bay where she was during the three or four hours that you lay there to see how she would act, looking at her?

A. Well, she was off probably eight or ten miles from the island, the Pellee Island; off there about north northwest, I should judge; it was off there 8 or 9 miles or such a matter, off the Canadian beach.

Q. What sort of a hole there that three or four hours?

A. I don't know what sort of a hole; it must have been a pretty good one; it let the water in pretty fast; it seemed to be forward.

Q. But you could not find it forward?

A. I could not find it.

Q. How far were you from the mouth of the river at two o'clock that morning?

A. Oh, I should judge that was eighteen or twenty miles from the river, and she was beached about that distance from the rivers. I don't know exactly the distance in there to the bay; probably a little further around in there where she lay; she lay about three miles above the point.

Q. Now, you said that after you had been below and could not find the leak down there fifteen or twenty minutes you came on deck and went to the Wilcox, and that you went to the captain of the vessel and talked with him about towing her in?

A. Yes, sir.

Q. Did he tow her in as soon as you asked him to?

A. No; not right away; I don't know exactly; it may have been an hour after I first spoke to him before we made up our minds whether it was best to take hold of her or not; there was so much water in her.

Q. Then for two or three hours before you spoke to him at all about towing her in or about doing anything else there was absolutely no effort made of any kind?

A. Nothing; only laying there.

Q. There was absolutely no effort of any kind to get the
51 vessel into shallow water or do anything else with her?

A. No.

Redirect examination:

Q. You were asked the question by Mr. Goulder what you stood by there for after you got onto the tug Wilcox, and you said you were there to see how she would act. Did you have any control of the Wilcox to say how soon she should start, or did the captain of the Wilcox control her?

A. The captain of the Wilcox controlled her.

Recross-examination:

Q. He was hired to tow your boat, was he not?

A. Yes, sir.

Q. Had he any objections to towing her wherever you wanted *you* to?

A. Certainly he had.

Q. What was his objection?

A. He said he would take hold of her provided some one would steer her.

Q. He had no other objection than that?

A. Not that I know of.

Q. You know of no objection on his part if somebody would steer her to towing her wherever you wanted her towed?

A. No.

Q. Or anywhere else?

A. I didn't ask him to; I wanted to get her into shallow water.

Q. Now, at the time that whistle was blown, was the water over the shaft aft in your vessel?

A. No, sir; there was no water aft.

Q. How much was there forward?

A. There was about two feet in forward, in the forecastle; two to two and a half—I did not measure it exactly—as near as I could judge from the looks of it from the scuttle.

Q. You have already stated your vessel was by the stern and drew more water aft.

A. She did certainly when she was running in good trim.

Q. Did you not tell me that when you were coming down Lake Huron and down the St. Clair river your vessel was drawing more water aft than forward?

52 A. No; did not mention the St. Clair river.

Q. Now, on Lake Huron that trip and coming down the St. Clair river that trip, was she by the head or by the stern on Lake Huron?

A. She was by the head on Lake Huron.

Q. Did you tell the captain of the Wilcox, when you made arrangements for him to take you in tow, that your shaft was cock-billed—tipped?

A. No, sir.

GEORGE ELLIS, called on behalf of the plaintiff, being sworn, testified as follows:

Forty-three years; followed the lakes since about 16 years of age; have been connected with tugs about 4 years. I was fireman on the Sprague right there after the shaft broke. She was leaking aft; to what extent I could not say. We had means to get it out by siphons and put them to work; I used one of the siphons; they work by steam. How a siphon works on a boat I could not say, because it was underneath. I had a guage to turn the steam on. We kept her dry all the time. We broke down in the afternoon some time. When we reached Port Huron I don't remember. I was on watch some time between there and Detroit. The siphons then kept her clear from water. On the night the boat was abandoned I went on at 12 o'clock; first I knew of calling the Wilcox back it was about 2 o'clock, as far as I can recollect; I was below attending to the fire; I heard four whistles.

Q. At the time of that call how deep was the water around you?

(Objected to, objection overruled, and defendant excepted.)

A. It was up to my knees here (indicating) in the fire hole. W-en I went on at 12 o'clock it was all right; am not able to explain in any way what made that increase of the water.

53 Q. What is the fact about whether vessels do sometimes begin to leak in a calm when you cannot explain how the leak comes?

(Objected to, objection overruled, and defendant excepted.)

A. I could not explain that; I have not known of other cases of the kind where you did not know the cause of the leak.

Q. Do vessels begin to leak when you cannot explain how it comes?

A. Yes, sir. The coal was kept in bunkers each side of the boilers, and a little coal in the front that the deckhand shoveled out for me. I don't remember how about there being any water in there; was not over there myself. It was about three-quarters of an hour or an hour before the water got up nearly to my knees that I discovered an increase of water. I was doing my best trying to save the Sprague, working away to keep the fire going to keep the siphons at work. The water was gaining all the time. From the time the break occurred upon Lake Huron to an hour before the signal for the Wilcox my fire was good; nothing to interfere with keeping them good. I kept her dry on my watch all the way; on the next watch it was always dry too. I can't say how long I staid on the Sprague after the call for the Wilcox. I left the Sprague to get on the Wilcox because she was sinking. I made no effort to get off my things. The other men all got off in a hurry. Captain Bowen and the second — got on the Sprague. The Wilcox towed her as far as she could get, I suppose. I am no captain; I don't understand anything about navigation.

Q. State whether it would have been good seamanship and prudent to try to tow the Sprague across the lake to Cleveland at the time you got ready to leave her.

(Objected to, objection overruled, and defendant excepted.)

A. Well, sir, if I was to get Lake Erie for it, I would not take it across—yes; I mean it was not prudent.

54 Cross-examination:

I was on watch when the shaft first broke. We were — sight of Pt. Au Barques, about 8 or 10 miles off; couldn't tell whether north, east, west, or south of us; could not say how far from the stern pipe the shaft was broken—that is for the engineer to answer—nor whether the shaft was tipped up when on Lake Huron. Most of the water, as I understand, was aft. This fire hole is right forward; the siphon worked forward. I cleaned out with one siphon all the time. I could not say how large a leak was in there by the stern bearing, because I had nothing to do with the stern; my place was forward. When that whistle was blown on Lake Erie I could not tell you how much water was aft. When I first noticed any trouble from water it was about one o'clock. I set one siphon to work then to try to keep it out. I seen I could not do it, and tried to put in another siphon. I don't know whether anybody had used the pump; they were steam pumps aft; the boat's pump was working. How long our siphon continued to work I could not say; I left her with forty pounds of steam. The water was getting up to the grates then; whenever it touches the grates of course the fire goes out; don't know what time we got aboard the Wilcox; could not say how long

till we took the Sprague to the beach. It was about daylight then. During that time I was sitting on the deck.

Q. Who was then trying to save the tug Sprague?

A. There was nobody trying to save her that I know of. My son helped me aboard the Wilcox. There was a pretty good sea. I didn't want to venture anywhere going up. I took her when she was coming down. I could not say how far we were from the mouth of the Detroit river, nor how long it would have taken to tow the Sprague back to the Detroit river; don't know anything
55 about the weather between Pigeon Bay and Cleveland. If she had not sprung aleak we would have come to Cleveland. I don't know whether it would have been prudent to have come by Detroit or not. If she kept on the same as my watch I would have chanced it to Cleveland. If we had a good, fair wind we ought to be in Cleveland in 18 or 19 hours, anyway. I did not bother much about the weather. It would depend something on the weather whether it was proper to pass Detroit and go out on the lake. I know how the stern pipe was fixed; how the leak was stopped there. I was there myself after it was fixed; I seen it. They got some oakum and quilts and stuffed it up, and then they got some iron ore and put on top of it to keep it down. That is all I seen done. I don't know of any other precautions being taken at all. I say it was prudent in that condition to go on. I say we kept the water out of her so far. I did not go down where the shaft is, and know nothing about the condition of things down there when we left there.

FRANK PATTEN, called on behalf of the plaintiff, *and* testified as follows:

I live in Cleveland; have followed the lake six years; was on the Sprague; I was deckhand; she had two. It was another man's watch when the shaft broke. After they got rigged up and the Wilcox started to tow us I did have opportunity to know what the condition was of the water. There was none, if any amount, coming into the hull. We all looked down below. Yes, sir; the siphons were sufficient to keep her clear in river St. Clair; was on watch coming out of Detroit river. She was then making about six inches every couple of hours; then put the siphons on and pumped her out. I was asleep when they signalled for the Wilcox. Ellis came down and told me that the boat was sinking. I looked in the fire
56 hole; seen she was making water pretty freely. Ellis, the fireman, was down there. I should say the water was about eight or ten inches, maybe a foot deep. I heard signals made for the Wilcox. The whistle was blown twice.

Q. What was the condition of the water from the time you first waked up until the Wilcox got back, whether there was any increase of water?

A. The water was up to the fire grates. It must have been all of that high (indicating about 18 inches.) When the Wilcox got back all the crew got aboard the Wilcox fast. We had some clothes down below where we slept—a suit of clothes. I did not go back for them.

The boat was going down pretty fast, and I thought a little more of my life than I did of my clothes. None of them went back for their clothes. After we got aboard the Wilcox there was nothing done for about half an hour, until they got a line and towed her ashore as far they could, and left her to drift. The drift setting towards shore, the line was taken off of her, and the captain of the Wilcox went quite aways from the Sprague and waited around there for about an hour. Then we had breakfast and started for Cleveland. The men on the Wilcox got breakfast first. They got through breakfast after the boat was towed in.

Cross-examination:

Have been generall- a deckhand. Never had anything to do with the navigation of a vessel. By deckhand I mean I wheel the coal to the fireman. I was asleep when the shaft broke. Was abreast of Pt. Au Barques; could not say exactly how far, nor what direction. When we past Pt. Huron I was on watch, passing coal to the fireman. When we passed Detroit I was on watch—down in the fire hole. I made no examination at all of the broken shaft, and
57 know nothing about the *the* condition of this stern pipe. They took some bed quilts to calk her up where the leak was. I went down below and seen Captain Bowen, the first engineer, and a couple of other men. On Lake Erie I did not go down aft at all, and don't know the condition. Joseph Bowen was wheelsman. I don't know what he was doing after I came on deck, nor where he was, nor where the mate was. I could not say exactly anything about how much of a leak there was there on Lake Erie. I know how dangerous a condition this leaky place, this stern pipe, was in when we passed Pt. Huron. I did not examine it, but I seen the water in the hole. I went down below and seen after they put these bed quilts and things in, and got the siphons to work and pumpted her out again. That is all I know about it. Whether that bed clothing and stuff was almost ready to come out when we passed Pt. Huron or passed Detroit I do not know; don't know anything about that. If she came from Pt. Huron I should judge she could make the rest of the way; it is very near one distance. From Pt. Huron down was in the still water of the river. After we got outside of Detroit river we had a little sea. That did not make any difference, in my judgment. Well, I could not say exactly where the shaft was broken. I did not go aft at all. It was not my business. Whether that would make any difference about the safety I can't say. My business was all forward. I don't know. When we jumped aboard the Wilcox I could not say which side of Pt. Au Pelee, nor how far off land or from Pt. Au Pelee, or from Detroit river. These things are part of my business if I knew, but I don't know. I can handle a tug in a river, sir, but, to go on a voyage with a tug, am not exactly competent; never did it. On Lake Huron she was making six inches of water every couple of hours.
58 She used to make a little water in the river—three or four inches in an hour or hour and a half; used to pump it right out again. We worked the two siphons all the time. On Lake

Huron, before we got to Port Huron, I say she made, running both siphons, about six inches every two hours. I don't know nothing about the pony pump. On Lake Erie, when I saw water in the fire holes, I can't tell how much water was aft.

WALTER S. ROSE, called on behalf of the plaintiff, being sworn, testified as follows:

I live at Lorain, Ohio; have been following the lakes 36 years. I was mate of the Sprague. I was second mate on the steam barge Chisholm one season. I never served in tugs before. Besides the steam barge Chisholm, had never been on any other steam vessel at any time. The shaft broke about four o'clock in the afternoon. In an hour or an hour and a half the Wilcox came. I had nothing to do with fixing up the shaft after it broke where it went through the stern pipe. I seen it often after. Some water was coming in, but nothing to amount to much.

Q. What was the fact with regard to the ability of the siphons or pumps in the tug to keep her clear of water after they got her fixed up and started down towards Port Huron?

(Objected to, objection overruled, and defendant excepted.)

A. As near as I could tell, they worked the siphon about half the time. I should think, as near as I could judge, that kept the water out all the way from the time the accident happened. When we got into Port Huron and came through there I was on deck or below; I think I was on deck. Between there and Detroit I did have a watch on deck. The condition of the boat was just the
59 same all the time. Yes, sir; the siphons kept her all right.

Q. So that when you got to Detroit, state what need or occasion there was for your stopping there because of any leakage that you were not able to control; whether there was anything of that kind.

(Objected to, objection overruled, and defendant excepted.)

A. There was nothing any more than there was all the time down—just the same.

Q. What do you say as to its being a matter of prudence for you to come past Port Huron or to come past Detroit and to try and get the tug to the home port in order to have her repaired there? The question is, whether the captain exercised reasonable prudence in bringing her by?

(Objected to, objection overruled, and defendant excepted.)

A. I think he did. On Lake Erie the first I got any intimation that the dangers of the boat was increasing the second engineer came and told me, and I was on watch at that time. I called the captain. He signalled her right off. Before the Wilcox got back I remember there were two signals. As soon as I got a chance to go and look, I went and looked in the fire hole. The fireman was just coming out—could not keep the steam any longer. I saw the water swashing around in the fire hole. To the best of my opinion, they

could not keep fire with the water as deep as it was; it would shut off the draft. From the time the packing was put around the stern post to prevent the water from coming in, I examined to see about the water coming in until we got down into Lake Erie, a good many times; used to go as often as every ten minutes on my watch and look in the crank pit. I did not go at that time to see if it was increasing. Coming down along through the river, found it just the same all the time. After the Wilcox came alongside the crew
60 got off about as quick as they could. They were afraid she was going to sink. I don't know whether they got all their things; I got mine. We laid there with the Wilcox—thought better stop till she went down. That was all she done—lay around there and wait for the tug to sink. They saw she did not go right down and they towed her to the beach, as far as he dared go with the Wilcox. Then she drifted close to the beach and sank just so her upper works were out of the water. When we got ready to get off that boat it would not have been prudent to try to tow her through to Cleveland in the condition she then was.

Cross-examination:

The sum total of my experience on a tug was almost one round trip. This was the first experience I ever had with a broken shaft or with the stern pipe of a steam vessel. In my watch I went down to look into the crank pit, I believe they call it. I did not look at the stern pipe. The only time I saw that was when we were down at our meals. It was right there where the dining-room was. I went to look into this crank pit to see how that leak was getting along—how much water it was making. That is exactly what I went for. I looked quite often. It may have been longer or less than ten minutes. I could not tell exactly. I do not know that one of our siphons was going all the time. I don't know as they run the pony pump at all. I had nothing to do with running of the siphons. I looked over the sides; could not see water running out all the time; should judge by that they was not going all the time; maybe I looked over several times on the way down the river—a good many times. It was natural to. Joseph Bowen was wheelsman. Before the signal was given to the Wilcox on Lake Erie, I think, he was to the wheel. I ain't —; I forget, it is so long ago, whether that was in my watch or not. I think it was.
61 I don't know what he was doing after the signal any more than the rest of them—getting ready to get on the tug. Before that signal I was keeping my watch forward. The last time I was down aft in the boat, I think, was about the time we passed Detroit. I was not down there on Lake Erie. I never tried to poke anything into it. I don't know as any one did on Lake Erie. I don't know anything about that. I had nothing to do with stopping the leak. When my attention was first called to the fact that the leak was gaining it may have been fifteen minutes before the Wilcox came alongside. I don't know how long before the signal was given the leak began to gain. The captain was not on deck fifteen or twenty minutes before he blew that signal; he blew it

right off; I am positive he was not. I don't know whether he made an examination down aft or not. My idea of it is, being in charge of the boat, word came to me that the leak was gaining rapidly. I called the captain. He came right out on deck and at once blew the signal for the Wilcox and she came right back. I made no attempt to do anything down there aft at all. I was told to get the boat cleared away. After we got onto the Wilcox she laid there some time; I could not state how long. It may have been an hour or an hour and a half. She might have taken ten or fifteen minutes towing us after she started in. I could not be positive about that; then steamed out into the bay. It was not but a short time before the tug got in very near into the beach and settled down and we started for Cleveland. Our tug had not touched when the Wilcox let go the line. I don't know how much water was in the tug when we left her. After I went down first to look into the fire hole I did not look at the water after that in her. From the blowing of the whistle until the Wilcox let go our tug in by the beach it might have been over four hours.

62 I could not tell exactly, and my estimate of the time of towing into the beach was ten or fifteen minutes; might have been, perhaps, a little more; so that makes it from three to four hours that we must have laid alongside the Sprague before she was taken in tow to the beach, if I have given the time correct. I can't tell about that. Our captain went aboard to steer the Sprague. I don't know anything about his opening dead-lights. If you open a dead-light you make a circular hole about six inches in diameter down in the hole of a boat about two feet below the deck. The dead-light was forward. We were at that time about thirty miles from the Detroit river—in that vicinity; I think about three miles above Pt. Pelee; about in the course, rather on the Canadian side, if anything. I don't think there was any steam pumps aboard; I never saw any; none were used that morning. No attempt was made, so far as I know, to do anything after the engineer or somebody said the fire had cut off the draft. I don't know of anything. I was officer in charge of the deck at the time the alarm was given, and at the time it happened the first officer of the vessel under the captain. I received no orders from the captain to do anything; only to get the boat cleared away is all. I transmitted no orders to the crew. I saw none of the crew carrying out any orders or doing anything, except to get themselves and this dunnage, as I call it, onto the Wilcox; that is all.

Re-examination:

The siphons discharged a stream, I should think, a foot above the water line of the boat. Yes, sir; if they had been working. I could see them throwing the water out there at the side that way.

Q. You were asked what you did while the Wilcox lay around there to save the Sprague—what was there you could do, if

63 anything?

(Objected to, objection overruled, and defendant excepted.)

A. Nothing at all.

Q. If it was decided to be proper to get the Sprague towards the shore, where would it be better for everybody that had any interest in her to have her go—to let her go entirely out of sight or where she would be nearly covered with water?

(Objected to, objection overruled, and defendant excepted.)

A. Right where we did take her. We took her right as near the beach as we could take her and where she would be under water where the sea would not have a chance to break her.

WILLIAM ROBBINS, called on behalf of the plaintiff, being sworn, testified as follows:

My business is machinist and engineer; have followed the lake about six seasons. I was second engineer on the Sprague. After she was taken in tow by the Wilcox I do know about the condition of the shaft that was broken and its place where it went through the stern post. It had been stopped up with quilts where the water came in around the shaft. I went there and looked at it several times. There was no great amount of water coming in after it was stopped up.

Q. From the beginning of the tow by the Wilcox until you got into the St. Clair river what was a fact about whether she was able to keep clear of water by working the siphons?

(Objected to, objection overruled, and defendant excepted.)

A. She was perfectly able to keep clear.

Q. After you left Port Huron, all the way down through St. Clair and Detroit rivers, did you see whether the boat was relieving herself by the siphons of the water that did come in?

(Objected to, objection overruled, and defendant excepted.)

64 A. The siphons were taking it out as fast as it came in.

Q. Now, tell how far you had got from the Detroit river before you discovered that the leak was gaining on you.

A. It was in Pigeon Bay where the water commenced to raise on her. Down to that time I had not discovered any increase of the leak by this place at the stern. I was on watch at the time I gave the alarm. I did not know where the water was increasing; I knew it was coming in. I could see the water in the bottom of the boat rising. In her engine-room we had a hole that goes down to the bottom of the boat through the floor; I could tell by that.

Q. How long before giving the alarm had you had any opportunity to look at the place where the captain had tacked around the shaft where it came through the stern post to see what the condition was there?

(Objected to, objection overruled, and defendant excepted.)

A. Well, I looked at the stern pipe, where you speak of, about five minutes before I gave the alarm; I don't know as it was five minutes; perhaps between three and five minutes.

Q. What condition did you find it in compared with what it had been all the way down to Lake Huron?

A. The same, so far as I could see.

Q. When you say that you went back there and looked by the stern post, and the condition was the same as that it had been before, what do you mean—that the leak had not increased any?

A. I mean I could see no difference; I could not see any more water coming in.

Q. How could you account for the increase of water that you afterwards found coming in? Do you know anything about it?

A. I don't know anything about it. I don't know where the water came from.

Q. When the Wilcox came alongside how long before you
65 left the boat?

A. We got off at once. I left just as quick as I could.

Q. From the time you first noticed that the water was increasing on you until you left the boat give us your best idea about how fast that water increased.

A. Well, when I first saw the water increasing I went up and called the chief engineer, as I had orders to do, and I think perhaps an hour or an hour and a quarter; perhaps not so long. Her fires were out, as near as I could tell. I did not go down in the fire-hole, but I could see pretty well from the door.

Q. State whether or not prudence would have permitted the attempt to bring her in that condition across the lake to Cleveland.

(Objected to, objection overruled, and defendant excepted.)

A. I don't think she would have reached here—never. After the men had all got onto the Wilcox we tried to get her ashore and save her as much as possible. The Wilcox took her in as far as she dared to go. The wind took her in until she struck bottom, as near as I could tell; then we left her.

Cross-examination:

The last time I had been down in the crank pit was about an hour—as long as an hour and a half—before we left. I was in the stern of the vessel, where the shaft was broken; was about an hour and a half before I left the vessel. I just went there and glanced at it just before I called the chief engineer. Where the shaft was broken was almost a part of the dining —. I went down in the dining-room to look at the shaft, because I thought I must be mistaken about the water rising. I looked through the floor where the floor was broken, where the floor was taken up, at the after end of the dining-room.

Q. Could you see the place where they packed the stern pipe?
66 A. I could see a part of the stern pipe. How far the break was from the stern pipe I don't remember; it was about eighteen inches outside of the driving bearing. I cannot give the distance from the stern pipe to the driving bearing; probably less than five feet. I think the shaft was not straight in line after it was broken. I think it was cockbilled or tilted a little; it was in my

watch the shaft broke. When I went down there the water was sperting pretty lively; it was coming in considerable; they were packing it at that time when I first went down; I remember they put some oakum in.

Q. What made it leak at the stern pipe on Lake Huron?

A. It was broken.

Q. What was broken?

A. I think the stern pipe was broken, for one thing; that stern pipe was not less than five nor more than seven feet under water; when I went down there on Lake Erie I merely cast a glance; that was between three and five minutes before the alarm was given on our boat; I did not go down in there; it was under the dining-room floor; the dining-room lamps were lit; the light from the dining-room was sufficient; there was no light under this floor or back where the shaft was that I remember of; it was not necessary; this was an hour and a half before the signal was blown to the Wilcox; during that time the ponys were running; siphons were running; that is all we could do to keep her from sinking; I don't know whether any one else went down to the shaft; there was no oakum or stuff put in that I know off; I can't say; it was out of my jurisdiction entirely; I don't know; it was something I didn't pay any attention to. I don't recollect whether I saw the captain at all on deck before the signal was blown; I think he was asleep. The first engineer got up immediately when I called him; I don't think he had his clothes off; the Wilcox came alongside, perhaps an hour after
67 the whistle was blown; I think they blew three different signals. For an hour and a half before the tug was abandoned the water had been gaining; I don't know where it was gaining; it it showed signs of gaining aft; if it came in the boat it must have shown aft; it showed right under our engine-room where I could see; our engine-room was further aft than the middle of the boat. Whether the water was or not, during that hour and a half, pouring in through that leak I don't know; I cannot account for how the water came in; I don't know where the water came in; when I first discovered the danger, an hour and a half before the Wilcox came alongside, we was in Pigeon Bay then, perhaps ten or twelve miles above Point Pelee. They do a good deal of tug repairing an- machine work at Detroit; they make shafts; they have some large engine works there.

Redirect examination:

I cannot tell you exactly how long her stern pipe was; a hole was made in the stern post; then the stern pipe was what you may call a sort of a pipe put through that hole; furnished a sort of a socket in which the shaft worked. Then there is packing put in around that shaft to keep the water out. It must have projected in there a distance or else could not get the gland on, which is a sort of a socket which slips out, and this stern pipe is packed to keep the water out; then the gland is screwed up tight so as to keep the water out; I did not examine that stern pipe closely to see to what extent it was broken.

Q. What I asked is, whether you made any examination of that stern pipe so as to know that it was broken, or whether it was a mere guess; a mere hypothesis on your part that it was broken?

A. No, sir; when I answered the question before I told it
68 to the best of my judgment; I did not examine the stern pipe at all; didn't examine it any more than just glanced at it merely.

Recross-examination:

I did glance at the break; just ran down there and glanced at it when she first broke. It is upon that I base my statement to the jury that the stern pipe was broken. The shaft was cockbilled a little; it was out of position, as near as I can remember.

GEORGE ELLIS, called on behalf of the plaintiff, being sworn, testified as follows:

Live in Cleveland; when the shaft broke I was on watch; I was deck hand on the Sprague; passed coal to the fireman; Mr. Ellis, my father, was fireman.

Q. After you got under the tow of the Wilcox did you have any occasion to go to see where they put packing around?

A. No, sir; I did not; I had no business there. I was about an hour on watch until the Wilcox took hold.

Q. You may state whether during that hour the water came in to make you any trouble there.

A. No, sir; there was no water came in. My father worked the siphon; it was his duty.

Q. You say during all that time, as you were going through the Detroit river, the siphons were able to keep her clear of water?

A. Yes, sir; they was. I come on watch the night the boat went down, at 12 o'clock and went down in the hole; I did not notice any water there then. It was about one o'clock when I got this coal pretty near all shoveled out to the fireman, and I noticed the water coming in underneath the coal. I told the fireman there
69 was water in here, and he said there is water out here too in the fire hole, so he said he would go to work and put on the siphon. I kept on shoveling out coal yet, and he went on deck, I suppose; I don't know where he went to; but anyhow the water kept on coming in. I had no more use down in the fire hole; I had enough coal out to do him for quite a while and went up on deck and loafed around the deck probably a half an hour or more. When I looked down the fire hole again he was up over his ankles in water in the fire hole; so he went to work to put on another siphon; that was two of them forward; I don't know whether it was forward or aft, the siphons he put on, but he put two more siphons on, but the water kept increasing, coming in.

Q. How long after that, if you heard at all, before they made an alarm to call the Wilcox back?

A. The water was then up to the ash grates when they whistled for the Wilcox; she was sinking then.

Q. What made you all leave the Sprague?

A. We were afraid we would go down with her; she was sinking then; the men left hastily. We had breakfast after the Wilcox's had their breakfast—six o'clock or after six; after we had towed the Sprague into shore and had turned around towards Cleveland.

Cross-examination:

After the shaft was broken the coal that was up on deck aft on one tug was thrown overboard before the Wilcox came. I suppose about thirty tons—twenty or thirty tons; I could not say. The coal bunkers were right on the main deck, on the side of the boilers; the boilers are down in the fire hole. There was coal down in the hold forward of the fire hole. There was no coal in the bunkers at the time she broke down. I suppose there was a little floor under
70 the coal forward; I don't know about that. The tug was plank on the inside. There was a flat floor in her; it was about ten feet wide. I do not know how high that was from the bottom of the boat. When I first discovered some water forward I was upwards of fifteen feet, very near that, from my father. I did not know how deep the water was when I went out *out* on deck. When I looked down again he was up to his ankles in water. I don't know anything about how much there was aft in the vessel at that time. I do not know anything about the condition of this leak that was at the stern pipe; nothing about how it was fixed nor where the shaft was broken. I don't know how much water was in her when we left her. In the fire hole it was up to the grates. I should judge they were about eighteen inches high above the bottom of the boat. We were between the Dummy Light and the Detroit river—about half way. I do not know how many miles from the river to the Dummy Light. During that half hour I loafed around the main deck; right around amidship of the boat, near the fire hole; I had nothing to do. I did not get ready to leave the boat during that time. I hadn't any clothes to save. From the time I went on deck the first time until the whistle was blown, I could not say how long it was; I suppose it was about a half an hour or an hour afterwards. During the half hour I was on deck I don't know where the mate was, or anybody, only I and my father. I don't know what they were doing. I believe it was the captain that blew the whistle; before that I don't know what he was doing. I saw him the time he had hold of the whistle rope; that is the first time I saw the captain. After that we left the boat in about twenty minutes I suppose, or a half an hour after.

71 EDWARD KELLEY, called on behalf of the plaintiff, being sworn, testified as follows:

I have lived here (Cleveland) about twenty-seven years. Have been in tugs a little. I have been only a part of two seasons in a tug. I have sailed sailing-vessels, steamers, steam barges. I have been master since the spring of 1858.

Q. You are familiar with the ordinary make of tugs in this harbor and of the work they do?

A. Yes, sir; somewhat familiar.

Q. Did you ever sail the Sprague at all?

A. I was in her a few trips; yes, sir.

Q. I will suppose that the Sprague was in charge of a tow upon Lake Huron along about the 21st of July, 1884; that when she was seventy or eighty miles above Port Huron, on Lake Huron, she broke her shaft, so that she became unable to take her tow, and after lying by an hour or so another boat came on, the Wilcox, and was hired to take her tow in charge and herself besides, and bring them on to Cleveland. Now, I will suppose that the captain in charge went down to the place, when the shaft came through the stern post, and by the aid of oakum or quilts stopped up the leak, so that no larger amount of water came in than he could draw off by the use of siphons. Suppose in that condition of things he came on to Port Huron, and found on the way down from there to Port Huron he had no difficulty in keeping the boat clear from water from any source, what do you say about his exercising his judgment to keep on in tow in that way to bring his boat home to Cleveland to have her shaft rebuilt and to have her put in order there—whether or not it was reasonably prudent under those circumstances?

(Objected to as not giving all the circumstances and incompetent. Objection overruled and defendant excepted.)

72 A. Well, if the hull or body was in good shape, nothing wrong with that, I could not see any cause why he should not bring her here; it is rulable to do so.

Q. Taking into account the time of year, that being in July, would that be a favorable time to do it?

A. Yes, sir; of course; late in the season, in November, it probably would not be as safe to bring her here as it would be in summer weather.

Q. How long before this had you managed this boat?

A. The trip before she broke down; the same season.

Q. What was her condition, so far as you were able to judge, to do duty?

A. She was in first-rate condition.

Q. Suppose that coming through the St. Clair river, the St. Clair lake, and Detroit river, the siphons acting with the steam that was kept up were sufficient to keep her clear from water, what would you say as to its being a matter of prudence to go on past Detroit in the tow she was, the weather also being favorable at that time, to try to get through to her home port to Cleveland, whether it would be reasonable prudence for a captain to exercise to do that?

A. I should think he was using good judgment, as long as the weather was good, to bring her through.

Q. Suppose that in the course of the night, along about two or three o'clock in the morning, after they got into Pigeon Bay, almost to Pt. Pelee, the water was discovered coming in from some source or other, the captain went back, but could not find there was any substantial increase of water coming by the stern pipe, through which the shaft came; finding that in about the order he fixed it be-

fore, but that she was filling with water from some source, the water gaining on them; finding that after they put on their siphons,
73 perhaps put on the pony pump in addition, the water continued to gain on them, what do you say as to the propriety then of signaling the Wilcox that was ahead to come back and take them in charge and take them ashore; whether that would be a prudent course for the captain to take?

(Objected to, objection overruled, and defendant excepted.)

A. That would be a prudent course to take, to get the assistance of a tug to take him ashore or take him to some port.

Q. Suppose now they had got so far down they were within two or three miles of Pt. au Pelee, three or four miles from the Canadian shore, state whether it would be prudent then to ask the captain to tow the sinking tug Sprague in towards the shore so as to get her ashore well as he could.

(Objected to, objection overruled, and defendant excepted.)

A. That would be a prudent course to take, to get the assistance of a tug to take him ashore or take him to some port.

Q. Suppose now they had got so far down they were within two or three miles of Pt. au Pelee, three or four miles from the Canadian shore, state whether it would be prudent then to ask the captain to tow the sinking tug Sprague in towards the shore, so as to get her ashore as well as he could.

(Objected to, objection overruled, and defendant excepted.)

A. That is the only resource he would have, so far as I could see.

Q. Suppose that in the course of an hour the water had risen from a few inches up to the knees of the fireman who was trying to keep up the fire in the fire hole, the siphons working all the time, the pony pump, perhaps, in addition, what do you say as to whether it would have been prudent to try to bring her across the lake to Cleveland?

A. No; I don't think they would have got her across; it would have been impossible to do it.

74 Cross-examination:

Q. Suppose that on Lake Huron this tug broke her shaft and driving bearing, no bearing inside at all to support the wheel outside, and that in doing that she had broken her stern pipe and had caused the water by the breaking of that stern pipe to squirt in there in great quantities; that would be a dangerous leak, would it not?

A. Yes, sir; it would.

Redirect examination:

Q. Suppose it was a dangerous leak; if the captain, after getting back there to it, by the use of oakum and blankets packed in around there against the sides, was enabled to overcome the leak so that by

the use of merely one siphon half of the time it kept the boat free from water; would it be in any way hazardous to attempt to go on with the tow?

(Objected to, objection overruled, and defendant excepted.)

A. No; so long as the hull was in order I see nothing to hinder bringing her through.

Q. The hull being in order or the stern pipe, do you mean?

A. If the stern post was broken then her hull would not be in order, but the stern pipe is a different thing. You can pack the stern pipe or calk it even if it is broken. I have run through the lakes with a broken stern pipe. If the stern pipe was broken the vessel would be in an unseaworthy condition as soon as that was broken if I could not calk it. If I could stop the leak I would call it seaworthy.

Recross-examination:

Q. Would you call her seaworthy with her shaft broken between the stern pipe and the driving bearing, not over two feet inside the stern pipe, and the propeller wheel is fast in its place outside?

75 A. That boat was solid in there so that her shaft could not have raised up. Her stern bearing was right up to her stern post, almost so the shaft could not work in it, unless the shaft was shoved out four or five inches.

Q. Suppose it did cockbill; then it would have a tendency to break the bearing?

A. Of course.

Q. Now, suppose that it cockbilled and had broken the stern pipe, not only that, but it pushed the timber up there and broke the floor and broke something about it—cockbilled to that extent—now you cannot say that vessel was seaworthy, can you?

A. Not if she was leaking. If I could not stop the leak I would not consider her seaworthy.

Q. Could she have been repaired at Port Huron or Detroit?

A. She could not at Port Huron, but at Detroit of course she could. She could have been repaired at Port Huron by sending the shaft to Detroit. The shaft could have been taken out at Port Huron and a pine block driven in there, making it so tight nothing could make it leak. That could have been done by putting her in the dock. It would not take long to plug her up, of course.

Q. How long would it take such a tug as the Wilcox to tow the Sprague alone twenty miles in a light sea or in a light wind?

A. She could do it in two hours. I think she could tow her ten miles an hour. If she was filling with water they dare not tow her at full speed; would have to tow her slow.

W. B. Scott, called on behalf of the plaintiff, being sworn, testified as follows:

I was acting for the Union Insurance Company of the City of Philadelphia, as agent in this city, along in 1884.

76 Q. I want to know if you recall the circumstance of the tug Sprague being reported to you as having a broken shaft up on Lake Huron and being started to be towed from there down to Cleveland by the Wilcox.

(Objected to, objection overruled, and defendant excepted.)

A. I do, sir. It was about the 23rd of July. I know Mr. Patrick Smith, the owner.

Q. Will you tell us whether Mr. Smith came to your office and signed such proofs of loss as you prepared for him there?

(Objected to, objection overruled, and defendant excepted.)

A. I made proofs of the loss of the tug Sprague in the usual way and sent them forward to the company at Buffalo.

(Answer objected to, objection overruled, and defendant excepted.)

Q. Who signed them?

(Objected to, objection overruled, and defendant excepted.)

A. Mr. Patrick Smith.

Q. You may state whether at the time he executed an abandonment that you had drawn up of that vessel for him.

(Objected to, objection overruled, and defendant excepted.)

A. Yes, sir; it was some time in July, 1884, I sent that on to the company.

Q. Now, after this had been sent on, you may state whether the company sent on any person here to go through and examine the condition of the tug—sent some one on from Buffalo.

A. Captain George McCloud was sent here by the underwriters to examine the vessel as she lay on the beach where she was wrecked.

Q. Do you know whether he went over in a tug from here and who furnished the tug that went over there?

A. He came here and one of Smith's tugs went over there.

Cross-examination:

Q. Those matters you have spoken of were in writing, were they?

77 A. Partly in print and partly in writing. No request has been made to me to furnish them.

WILLIAM SCOTT, called on behalf of the plaintiff, being sworn, testified as follows:

I am the son of Captain Scott. I know Captain McCloud, of Buffalo.

Q. When he came up here in July, 1884, to find out about the condition of the hull of the Sprague did you go with him across the lake?

(Objected to, objection overruled, and defendant excepted.)

A. Yes, sir.

Q. Whereabouts did you find the hull of the Sprague, if at all, with reference to Pt. Au Pelee?

A. The light-house was plainly in sight; probably a mile or so.

Q. Do you know about when that was?

A. Yes, sir.

Q. What date was it?

A. Well, we telegraphed——

(Objected to.)

Q. What was the date when you telegraphed?

A. As soon as possible after we notified the company.

Q. Just as soon as possible after they got the notice?

A. Yes, sir; that the boat was ashore; as soon as a man could come here from Buffalo.

Q. Do you remember whether that was in the month of May?

A. Yes, sir.

Q. Now, you may go on and tell what the condition of the tug Sprague you found to be over there, whether she was under water and how far from the shore, etc.

(Objected to, objection overruled, and defendant excepted.)

A. Well, she was in shallow water—that is, probably ten feet of water; probably one-eighth of a mile from shore. Well, one rail, the rail out of the water, was very badly broken, but she had fallen out of port towards the lake, and the waves had washed in
78 and washed her decks, and everything exposed the machinery.

Q. Whether or not the boat was practically broken up or not is what I want to know?

A. She was.

Q. Do you know what conclusion Mr. McCloud reached there himself in regard to it that time?

(Objected to, objection sustained, and plaintiff excepted.)

Judge INGERSOLL: I offer to prove that this agent said while there at the time she was a total loss and that nothing could be done to recover it.

The COURT: I rule it out on the ground that he could not bind the company by saying that.

W. B. SCOTT, recalled, testified as follows:

By Mr. INGERSOLL:

Q. I want to ask you what the custom is among insurance companies here in Cleveland in regard to employing an agent in their behalf to go around and examine the tugs in this port every spring preliminary to insuring them so as to get the rating of the various tugs?

(Objected to, objection sustained, and plaintiff excepted.)

Q. (Paper handed to witness.) Was that issued by your firm's agent in Buffalo of this company?

A. Yes, sir.

Q. Do you recollect where you got that valuation that was put there on the tug?

(Objected to, objection overruled, and defendant excepted.)

A. From the underwriters' book. They have a book for the purpose of classifying all vessels and placing upon them the value for the purpose of insurance.

The COURT: Now, you may ask whether the underwriters employ a man to go around in the spring to find out the condition of the various tugs and other craft here for the sake of rating them, with a view of determining the rate of insurance to be paid.

(Exception by defendant.)

79 By Judge INGERSOLL:

Q. What do you say?

A. They do, sir; that is, for their own convenience entirely.

PATRICK SMITH, called in his own behalf, being sworn, testified as follows:

Have lived in Cleveland since 1836; in the tug business twenty or twenty-five years; have run a tug on the lakes, between here and Detroit and Ashtabula, and all around—Toledo. I was the owner of the Sprague in the month of July, 1884. After this tug had gone to the bottom in Lake Erie, and I got report of the thing, I went over to Mr. Scott's office, to the agent where I had got her insured, in the city.

Q. State whether he at that time drew up certain proofs of loss which you signed there at that time.

(Objected to.)

Q. Who drew up the proofs of loss?

A. Captain Scott.

(Objected to, objection overruled, and defendant excepted.)

Q. Who signed them?

(Objected to, objection overruled, and defendant excepted.)

A. I signed them.

Q. You may state whether any objection was ever made since that to the form of that proof by anybody.

(Objected to, objection overruled, and defendant excepted.)

A. I never heard any.

Q. (Handing paper to witness.) Look at that and see whether that is a note that was given for insurance.

A. Yes, sir; that was paid when it fell due.

Q. They accepted the entire amount of the note, did they?

(Objected to, objection overruled, and defendant excepted.)

A. Yes, sir.

Q. Have you held any public position here in this county
80 within the last four or five years?

(Objected to; objection sustained.)

Judge INGERSOLL: I want to show that the witness has been one of the county commissioners of this county within the last five years.

Q. Suppose that a man has a tug upon Lake Huron, in charge of her as captain; she has three vessels in tow, and her shaft breaks three or four feet in front of the stern post, somewhere along there, and in the course of an hour or two, along about five o'clock in the afternoon, another tug comes along and he puts it in charge of his tow and fastens himself on the stern of the tow and gives attention to the accident that has happened; finds that the water is coming in there, but by the help of oakum and bed quilts packed in there he is enabled practically to shut out the water, shut it out so that by the use of a single siphon half the time between there and Port Huron, which is a distance of seventy or eighty miles, he manages to keep control of the water; what do you say as to whether it is the exercise of good seamanship and prudence when you reach Port Huron to continue right on to bring her to her home port in Cleveland?

(Objected to, objection overruled, and defendant excepted.)

A. Well, I would consider it good seamanship. We do not regard the breaking of the shaft as a very serious accident, whether it is in port or out of port.

Q. If you could stop the leak state whether any such boat would be seaworthy.

(Objected to, objection overruled, and defendant excepted.)

A. I would not consider her unseaworthy to tow to Detroit or any other port.

Q. Suppose, after working her along in that way, you found
81 after you got to Port Huron you had managed to keep the water out so it had not gained on you; you kept on down through the St. Clair river, Lake St. Clair, Detroit river, got to Detroit, and you find you have kept your water, and it is the month of July—twenty-first or twenty-second—what do you say as to its being prudent to keep on in connection with that tow and bring her to the home port?

(Objected to, objection overruled, and defendant excepted.)

A. I think it would be prudent and good seamanship. The Sprague had a stern post between her wheel and her rudder port, and I think the space between the wheel and the rudder port was about three inches. If the shaft was broken inside the hull there would be nothing to prevent the shaft slipping back so as to let the wheel come back until it does strike against the rudder port.

Q. I want to inquire if, up to the time you had hired Captain Bowen and he took charge of this boat, you had any ground to suppose he did not have ordinary ability as a tug captain.

(Objected to, objection overruled, and defendant excepted.)

Q. Whether you had any means of knowing that he lacked reasonable and ordinary skill.

(Objected to.)

The COURT: I do not think it is important, but you may prove it.

(Exception by defendant.)

A. I had him with me a part of the season before as mate. His reputation stands as being a sober, practical man — everybody I have heard speak about him; and when I saw him operate tugs for us and Mr. Bradley he seemed to handle them first rate.

Cross-examination:

I don't know how many years since I had a master's paper—six or eight or ten—quite a number. I have been sailing back
82 and forward for twenty or thirty years; never did stay on a salary; was never hired to stay on any boat in my life; I never sailed regularly; I have sailed for a week or two occasionally, sometimes a month or so, just as business required me, when one of our vessels did not have a captain. Port Huron is the furtherest I have ever gone in charge of a vessel of any kind from Cleveland. I went up there with a tug for a barge and towed the barge back. The next furthest trip I ever made from Cleveland was to Toledo and Conneaut and Erie. That is as far as I have been. I never took a tow from here to one of the upper lakes; never sailed in any vessel in that trade in my life.

By the COURT:

Q. State to the jury what became of your boat.
A. She went on the beach there; she was a total loss; yes, sir.

LEWIS P. SMITH, called on behalf of the plaintiff, being sworn, testified as follows:

I am the son of Patrick Smith; I am familiar with the construction of the Sprague; she was put on our docks several times to be fixed—to work at her machinery. I do not suppose the wheel could slip or slide back more than four or five inches from the stern pipe before the flukes of the wheel would strike against the rudder post. If the shaft was broken, by any means, entirely off it would go right back; the velocity of the boat through the water would carry it back.

Plaintiff offered in evidence notice served upon counsel for defendant to produce proofs served the 16th day of February, two days before commencement of the trial and swearing of the jury.

(Objected to, objection overruled, and defendant excepted.)

83 A copy of said notice is hereto attached, marked "A" (see page 130). The plaintiff, immediately after the jury was sworn, demanded of the defendant the production of the proof of loss and the abandonment described in said notice last above mentioned, and at this time renewed said request and demanded that defendant produce said proofs of loss, and at the time of both of said demands defendant refused to and did not produce said proofs or abandonment.

Captain BOWEN, recalled for further cross-examination, testified as follows:

Q. I want to ask you whether the clothing of your crew was not put aboard the Selkirk on Lake Huron?

A. I think some of it was while we was lying there a couple of hours. I suppose some of our things were moved; to what extent I don't know. I did not put my clothing on the Selkirk. Some of their clothing was put there—what they had of their own; they moved a part of it and put it on the vessel while we were laying there.

Q. How many signals did you blow to the Wilcox to come back, on Lake Erie?

A. I blew two long blasts; I don't know whether I repeated it or not; I have no recollection of repeating it; I may have repeated it; I do not say I did, and I do not say I did not. After I first blew the signal until the Wilcox was alongside I should judge it was thirty minutes—thirty or forty.

Q. During the hour before you left your boat where was Joseph Bowen?

A. I could not tell you where he was—around deck somewheres. I don't know if he was down aft any of the time; I did not send him down aft that I know of; did not send anybody down
84 aft. I opened the starboard dead-light just before we left her—after the tug let go towing her to the beach, so she would fill up quick and lay easy. She was partly filled up. It was no detriment to open it or keep it shut.

Q. She was not on the bottom then?

A. I should judge it was probably two feet below the main deck; she was pretty near landed when I opened it.

Counsel here moved the court to take the case from the jury on the ground of absence of proof of a loss of plaintiff's vessel within the policy, and because there is not sufficient testimony to justify a recovery.

The motion was overruled by the court; to which ruling the defendant duly excepted.

And the foregoing was all the testimony offered by the plaintiff to maintain the issues on his part in chief.

And the defendant, to maintain the issues on its part, offered in evidence the following testimony, to wit:

Defense.

DAVID GIRARDIN, called on behalf of the defendant, being sworn, testified as follows:

I was master of the tug Wilcox; I have sailed outside lake tugs thirteen years; we picked up the Sprague on Lake Huron, about seven o'clock in the evening. I asked the captain the condition of his boat when I came to him; he said his shaft was broken and they were leaking very bad and in a sinking condition.

85 Q. And did he say to you that the shaft was cockbilled?

A. He said after the shaft broke it tipped up—cockbilled. I made a bargain with Captain Bowen to tow his tow to Cleveland for four hundred dollars, and that if his tug was in such a shape that he did not want to take the chances to come to Cleveland he could drop off at Port Huron or Detroit. He said if he should give me a signal at any time that I should let go the tow and go to him; the signal was to be four whistles. As we went down Lake Huron we had very fine weather, no sea to speak of. At nine o'clock in the following morning we passed Port Huron; passed Detroit about seven in the evening; we rounded Bar Point Light at eleven thirty p. m.; my watch was way off at 12 o'clock; I left my mate in charge; the weather was fine; I was relieved and left the deck about a quarter past twelve. I was called at three o'clock or a few minutes before; I got up as soon as I was called, put the wheel hard-a-port, checked down, and rounded to and alongside the tug Sprague.

Q. What was the weather then?

A. We had a nice breeze from the southwest; not a great deal of sea; just a nice little sea; a good summer breeze.

Q. State to the jury whether or not the weather you had then was usual or unusual for that season.

A. Something we have generally in the summer; the crew of the Sprague jumped aboard; then we layed from a hundred to two hundred feet—we drifted apart; we lay thus over three hours.

Q. At whose solicitation did you finally take her in tow?

A. The captain's; I had some talk with him.

Q. What, if anything, did Captain Bowen say to you during those three hours on the subject of towing his vessel anywhere?

86 A. He did not say anything; when we did take her in tow finally we towed her about three-quarters of an hour towards the beach; at the time that I came back to her, in response to her signal that morning, she was in the center of Point au Pelee passage, about five miles from the Canada shore; I should judge between thirty and thirty-five miles from the river, when the Sprague had water in her up to the floor of the fire hole. If we had — her in tow we could have towed her eight miles an hour, with the weather as it was that night; we were making seven miles an hour.

Q. State to the jury whether or not it was practicable, in your opinion, to have towed the Sprague back to the Detroit river.

A. Yes, sir; it was if the men had staid aboard of her.

Q. What men aboard of her would have been necessary?

A. It would want them all there.

Q. Suppose that this tug broke her shaft two or three feet inside of her stern pipe and between the stern pipe and driving bearing, and broke the stern pipe, so that the water sperted in there in large quantities, and they stuffed that up with oakum and blankets and quilts and what not, and then put some pieces of iron ore on the edges of the quilt outside; suppose that that shaft when it broke had tipped up, and after stuffing it up the best they were able to do, they left a stream of water coming — as large as a person's finger, what do you say as to whether the tug was in a seaworthy condition?

A. I say she was not.

Q. You may explain to the jury what would be the tendency of that wheel—having that wheel out there in the water, and the shaft broken between the stern bearing and the driving bearing.

A. The tendency would be, if she got into any sea, the least wab-ling would keep that packing loose. After we let go of the tug Sprague we remained in the vicinity fifteen or twenty
87 minutes, then started for Cleveland; followed the tow several hours after I let them go. There was one tow into the harbor and there was one outside three or four miles when I got here.

Q. What is the fact as to whether there was anything that morning to interfere with navigation that you saw or knew of?

A. I did not see anything to interfere with it.

Cross-examination by Judge INGERSOLL:

I reside — Amherstburgh, Ontario; I came voluntarily, because I wanted to, at Captain Reardon's request; didn't make any bargain; he didn't promise to do anything but find my expenses; Mr. Swan, of Detroit, he gave me some money to come over to Cleveland, or my fare; he gave me enough for two men—twenty dollars; I did not go aboard the Sprague at all; did not see what condition she was in at all; that was not my business; I can tell what the captain told me; I cannot tell what condition she was in then.

Q. If the shaft had been broken entirely off, entirely through inside of the hull, and the boat should start up after that, it would carry the wheel back against the rudder post, would it not?

A. It would depend on how fast she was going through the water; at the rate of a mile or two an hour it would not carry it back; she would have to go four, five, or six miles. I could not start up that fast just after hitching onto the tow. On Lake Huron it took us fifteen minutes, I believe, before we got usual speed. We were making six or seven miles an hour; we were going fast enough to throw the wheel back against the rudder post.

Q. You recollect the exact words, I suppose, that were used now over a year and a half, when you came alongside of this
88 captain and his boat?

A. Yes, sir; I can.

Q. You had not had anybody call your attention to it since, had you, to see if you remembered it—to remind *it* what it was?

A. Yes, sir; I have. Mr. Swan, three or four weeks ago. He is a lawyer at Detroit.

Q. What time did you say it was when you got down to the mouth of the Detroit river that night?

A. It was about eleven o'clock; between ten and eleven. It was my watch then. At the time they were whistled to come back we was between thirty and thirty-five miles out into the lake.

Q You did not mean to have us understand yesterday that after you were whistled to come back there by Captain Bowen, of the tug Sprague, and got back there that you told him it was best, in your judgment, to tow the boat back to the mouth of the river, did you?

A. I did not tell him. I was not there to tell him anything. I did not tell him any such thing as that.

Q. Do you mean to express the opinion that good seamanship would have required, when you got back there, to have taken the Sprague and towed her back into the mouth of the Detroit river?

A. If the men staid aboard the boat, I should say it was. They did not indicate any desire to stay aboard. They seemed to be in a hurry. I don't know what reason they had for it. I did not go aboard the Sprague to see how much water there was there; it was none of my business.

Q. I suppose the men there knew better whether they wanted to get off in a hurry than you did on the outside?

A. I suppose they would know.

Q. Did you hear more than one signal?

A. I did not hear any, only the second signal. I did not
89 hear the first signal. I heard from the mate there had been a signal before that.

Q. After you got and came back there did you take any minute of the time, from time to time along, from a watch you had or anything with you?

A. As soon as I got the men off the boat I looked at the clock myself and went down in the engine-room. I did make a minute of it. I looked at the clock again when we started for Cleveland. It was eight o'clock or a few minutes after. When we first went alongside the Sprague we took off all the crew but the captain, and she drifted off a little ways, and I had to go back the second time to get him off, and he was on deck. After we got him into our tug he was on our deck talking to me. We talked off and on until after breakfast.

Q. Did you talk about the advisability of putting the boat out on the beach?

A. Not for three hours after she lay there.

Q. Did you ask him what he wanted to have done?

A. I asked him what he going to do. He said he would stay around and see what she was going to do; expected she would sink in fifteen minutes.

Q. If she was going to sink in fifteen minutes there could not be much done to get the boat to the beach?

A. Not if she was going to sink in fifteen minutes.

Q. Who proposed taking her to the beach?

A. Captain Bowen.

Q. Did you say you were ready to do it?

A. I was ready to do anything he wanted me to do. I was hired to do his work.

Q. How near did you get that boat to the beach?

A. Our boat, being ahead, went within five hundred feet. I did not measure it.

Q. Could you see her then?

90 A. Yes, sir; she was in plain sight. *A.* The wind was drifting onto the beach. I waited until she touched the beach before I came away by orders of Captain Bowen.

Q. Suppose a vessel was found leaking—that her shaft had been broken. Do you say that if the captain could manage to stop the leak substantially, so that one siphon working half the time would be able to keep the boat clear of water, it would not be good seamanship to tow her along and get her to her home port?

(Objected to, objection overruled, and defendant excepted.)

A. No, sir; I don't think it would; I would not take the chances.

Q. What would be in the way? The weather was fine.

A. We cannot figure on the weather being fine all the time; if we could we could get where we wanted to.

By Mr. GOULDER:

Q. Did you notice the condition of the tug's dead-lights that morning on Lake Erie?

A. Yes, sir; I did; after daylight the starboard light was closed; I seen it opened some time after that.

Q. How long before you took her in tow for the beach did you see that dead-light opened?

A. A half or three-quarters of an hour.

Q. Do you know who opened it?

A. I did not see who opened it; the captain went aboard of her and when he came back that light was opened.

Q. Who had been aboard of the vessel between the time of taking off the crew and your seeing this dead-light open for three-quarters of an hour before she was taken in tow?

A. There was nobody but the captain.

Q. Judge Ingersoll asked you what was to prevent it being safe to pass a port of repair with the boat. I wish you would explain that a little more fully to the jury. Did you explain as fully as you wanted to?

A. I claim it was not advisable to pass a port in that condition; that she was not in a seaworthy condition.

91 By Judge INGERSOLL:

Q. You do not know whether the leak was stopped up or not, do you?

A. I did not go aboard to see.

Q. If the leak was stopped up was she not seaworthy?

A. No, sir; not in that condition.

NED MCGUIRE, called on behalf of the defendant, being sworn, testified as follows:

I reside just above Amherstburg—a couple of miles; was mate of the tug Wilcox; have sailed on river tugs twelve seasons. As we came alongside on Lake Huron I heard the captain say his shaft was broken. I did not hear anything about the cockbill. I heard him make the agreement. He said when he blew the whistle to him for to come back—to come and come like hell—he said he would. I did not hear the captain say anything about the condition of the Sprague. I heard the crew speaking of it. We went down Lake Huron from Point Au Barques to the river. We had nice weather. At that time there were at Port Huron two dry docks that I know of and at Detroit three. Detroit is a good place for repairing broken shafts or anything of that kind; see lots of them repaired there. I took charge of our tug after we passed Detroit, between Colchester and Bass Point, at 12 o'clock midnight, before the tug sank. They blew their whistle within a few minutes to three, as near as I could get at it. I blew to the schooner to look after his line and called the captain. We started back to the Sprague just as soon as we could get the schooner's tow line off. A signal was blown when we were going back to her. From the time the first signal was blown until we got back to her it was not over twenty minutes. The weather at that time was a breeze from the southwest. There
92 was no storm; a little swell running, not to amount to anything. We lapped our bow on her quarter and the crew got aboard, except the captain; she swung around away from us; we backed up and got alongside again and got him aboard. We laid right close to her and watched her sink. We drifted, I suppose, five hundred feet at times and back up and ahead; kept right close to her; worked right close to her; didn't go away from her any. After we had taken the captain off the first time it was over three hours until we took her in tow for the beach; during that time nothing was done toward saving or rescuing or doing anything else with the Sprague; during that time the captain went aboard of her in her small boat.

Q. You may state what, if anything, you know about the condition of this vessel's dead-lights at any time that morning.

A. They were open after the captain went aboard, before we took the vessel in tow for the beach, all of an hour. I saw the starboard dead-light open; before the captain went aboard they were shut. We had breakfast before she was taken in tow. I have been an officer on these tugs before and since—first mate. I know how a tug is formed aft and the shaft runs out generally; I have seen them.

Q. Suppose that the tug Sprague has her shaft broken between the driving and stern pipe so that the piece of the shaft attached to the wheel sticks inside her two or three feet or such a matter, and the wheel is on the outside; the stern pipe is broken—split so that a great deal of water squirted in—and they put some oakum in there and quilts or something or other and stopped that leak, except that on the under side there is a leak the size of your finger, what do you

say as to whether that vessel is in a seaworthy condition to be towed after three other vessels?

A. I should not think she was.

93 Cross-examination by Judge INGERSOLL:

I was never in a tug when the shaft was broken.

Q. Now, what was there about the case that was supposed to you that you say made her unseaworthy?

A. He said she had made quite a bit of water; where she had made water stuffed in with blankets. Stuffing in blankets made her unseaworthy to go across the lakes; that is what he was talking about.

Q. If you had a leak in a vessel would not good seamanship require you to stop it up in some way?

A. Certainly.

Q. Then it is not making it unseaworthy to put blankets in?

A. That was all right; I did not understand him that way at all.

Q. How did you understand him to say?

A. I understood him to take the boat outside in that shape.

Q. Well, she was already outside. She was up on Lake Huron, you know, seventy-five miles or so to start with. Would not good seamanship require they should try to stop the leak on the start, and, after they got it fixed, to tow ahead?

A. Yes, sir.

Q. Suppose they had got the leak so stopped that by the use of one siphon half the time they kept her clear and were in connection with the tow that would take them right on to their home port at Cleveland, where the owner of the tug lived, and you had gone seventy-five miles from where the break occurred down to Port Huron, would you not deem it advisable to keep right on as long as the leak was not troubling you any?

(Reference in question to home port and where the owner lived objected to.)

Q. You would take that into the account, would you not, if you were deciding about taking the boat home rather than to leave her somewhere away from home?

94 A. I don't know as I would.

Q. Then I will not ask you any further questions about that if you do not know whether you would or not.

A. I was in charge of the boat on Lake Erie. I know when Captain Girarden came on deck. I called him just as soon as they started to blow the whistle. I can't say whether one blew before he came out; there was one blown after he came out.

Q. Now, did the first one blow before the captain came out?

A. I don't know whether he was on deck or not before it was done blowing. The first one was not done before I called him. I think he heard the first signal. I don't know whether he did or not.

Q. Then if there was one blown while he was asleep that would be three. Do you know whether there was one signal blown from the Sprague before the captain came out of his birth at all?

A. I do not know whether he came out of his room or not; he was up before it was done blowing. The Sprague crew seemed to get on lively; some of them looked as though they were in a hurry. When we got along there I supposed she was sinking.

Q. Then afterwards she did not sink quite as fast as you folks expected there, did she?

A. No, sir; she did not.

Redirect examination:

I supposed she was sinking, because he said if anything was wrong he would blow his whistle, and to come back in a hurry; that arrangement was made on Lake Huron. I said to Judge Ingersoll there that the leak would not be dangerous while we had that weather that we had in the rivers on Lake Huron.

Q. That was smooth water?

A. Yes, sir.

95 GILBERT NEWTON, called on behalf of the defendant, being sworn, testified as follows:

I reside at Royal Oak, Michigan; have been an engineer on the lakes about fourteen years. I was first engineer of this tug Sprague. I was off watch when this accident occurred. When the second engineer came to the room and called me out I went out and I says, "Where is this thing broke?" "Down aft, somewhere." I went down; I went to the engine-room in the first place, and was not satisfied that it was broke. I opened my throttle, and of course she made one revolution or two, and I came to the conclusion it was broke. I ran down, and into the cabin, and I saw where the floor was. I can't say whether it was tore up by the machinery or the trap-door was taken up where I could see my work; see the shaft was broke and the water coming in there. The second mate says to me, "There is water below." I started and went around into the engine-room. I had a door from the cabin-room there into the lower engine-room. I went in there and saw she was making water. I went up into the engine-room and I says, "Get those siphons on." We started two siphons aft. I went forward and I started two more, and then I went down after I got those siphons started and started the pony pump. That was to help free the boat. Then I went in to see where the water was coming from, and they had got quilts in there and oakum, so that I could not really see where the water was coming from, and I noticed we was lowering the water, and I told the captain we were lowering the water.

Q. How much water was there in her at that time?

A. I had no gauge; no, sir; I should think there was about a foot of water, possibly a foot and a quarter. They had passed a line to the vessel, and the vessel came alongside.

96 Q. What was done, when alongide, with the clothing of the crew?

A. I think it was put on the vessel; I put mine on the vessel—my clothing—my valise. I could not tell what time it was the Wilcox picked us up; I think it was before supper; I would not say

positively. I went on watch at six o'clock. I think we were taken in tow before I went on watch. I was on watch until midnight. I don't remember what time it was the tow was made up and we got started.

Q. During that watch from six to twelve o'clock what, if anything, was done in the way of siphoning or pumping on your boat?

A. Well, we had one siphon that we used nearly all the while; it was a small one; that siphon would throw about an inch-and-a-half stream; I think that was what it was. We used, I think, about three minutes during the hour the pony, as slow as it would turn over—the pony pump; by working it full stroke I could throw a two-inch stream of water, but the way I worked it it did not. I went on watch at six o'clock the next morning. I would not be certain where we was the next morning. During that and my next watch, from six o'clock in the evening until midnight, going down the Detroit river, I was just running along the same way, with one siphon going nearly all the time; probably there would be three or four minutes during the hour that I would shut it off. When I used the pony pump I would shut the siphons off a minute, in order to let the stream come up.

Q. How much of the time was it that you had nothing going—either pump or siphon?

A. It would not be over three or four or five minutes to the outside in an hour. I went off duty then at 12 o'clock midnight. I was called between one and two'clock; when I came down in the engine-room I looked down; I saw the water coming up. I
97 says, "Put the siphons on." The second says, "The siphons are on." I ran forward and looked at the steam gauge; the steam was coming down; I ran forward and I says to the fireman, "Put in some fire." I saw there was water in the fire hole, the water rising there. I think about five minutes after I first got there I went down into the fire hole myself and the water had got up there so it shut my draft off—shut my damper; it would be about a foot deep. I went back in the engine-room; my steam was going down and I went below and opened another injection—entered the suction pipe for my pony into the bilge and let my pony run as fast as she would and shut off one siphon there.

Q. What was the depth of the water in the engine-room?

A. There was probably twenty inches of water; when I came up my steam was going down and I went forward; when I got forward to the fire hole again my fire was out; the water had raised forward and put my fire out.

Q. Now, when did you leave the boat and get on the Wilcox?

A. I could not tell you exactly what time it was; somewhere near three o'clock, I think; from the time I came on deck I was engaged in trying to clear the boat of water.

Q. During that time state, if you know, whether or not any one went down aft to where the broken shaft was?

A. I could not say whether they did or not.

Q. Have you any knowledge on the subject?

A. I could not say whether anybody went down there to try to

stop the leak or not; the shaft was broken just aft the driving bearing; there was a beam there to hold the floor of the cabin with.

Q. How far outside of the stern post was the wheel, say, to the center of the hub?

A. The center of the hub would be somewhere between twenty and twenty-six inches; I can't tell exactly how wide the hub
98 was; the wheel was eight foot six or eight foot eight in diameter; the distance from the driving bearing to the stern pipe was probably forty inches; it was between three feet and forty inches.

Cross-examination:

After I found out the shaft was broken I paid attention at once towards keeping clear of water. The water was coming at that time so lively I thought it desirable to put on two siphons in the rear and two siphons forward, and also set the pony pump at work to keep it clear.

Q. Now, after the captain had worked awhile at stopping the leak, with somebody to help him, one of your siphons running the greater part of the time managed to keep the boat clear after you once got her clear?

A. After we once got her clear—one siphon nearly all the while and the pony occasionally.

Q. Then it is fair to conclude, if I understand you, inasmuch as it took four siphons to start with a pony pump, the water running in so fast, that they made out to stop a considerable part of the leak when you got to where one siphon would control her?

A. Yes, sir.

Q. Did you pay any attention at the time you went back there to see whether this shaft was cockbilled—slanting on an angle from where it left the stern pipe—from the line it had been working on?

A. When I went back there, when I got so I could see to it, the shaft was—the after end had drawn back. The wheel drew it back, probably, but the two pieces of shaft were lying the same as they broke.

Q. Then how much was the shaft canted one way or the other out of line?

A. I don't hardly think it was canted any.

Q. After you got down into the Detroit river, as I under-
99 stand you, you had not any further difficulty in keeping her clear with that one siphon, occasionally using the pony pump, as you say?

A. No.

Q. After you got down there where the signal was made for the tug Wilcox to come back and she came back, do you know how soon after she got back alongside of you the crew left the boat you were in?

A. It was a very short time.

Q. Why was that? Why did they get off pretty quick?

A. My business was done in it. All my fires was put out, and I wanted to get off. I did not want to stay on a boat that was very

likely to go down with me. I can't swim. I wanted to be on something I knew would hold me.

Q. After you got aboard you lay around there some time on the Wilcox waiting? She did not go down as fast as you expected?

A. No; she didn't go down quite so fast as I thought she would when I got off her. Somebody, I believe it was the captain of our tug, says, "We are going to tow her to shallow water." I understood our captain to say he did not want to leave the boat until she went down, so he could report to the owners where she was. I heard the captain of the Wilcox say if somebody would go aboard and steer her he would put a line on her and tow her in towards the shore.

Q. Do you understand the construction of that boat in the bottom, inside, so as to tell us whether if water should get through between the planks at one end of the boat there would be anything to prevent its running right along on the bottom clear through to the other end of the boat? For instance, if water should come in through the bows would there be anything to prevent its running along as far as the fire box and then running even under that and showing itself there in the engine-room?

A. No; after the water got up about five inches in the fire
100 hole it would run aft.

By Mr. GOULDER:

Q. So if the water came in aft it would run forward?

A. Not until it raised about two feet over the keelson aft; then it would show the water forward. Under the boiler the coal dust had got in so that the water had to raise higher forward than the timbers was to get back. When the accident first happened, when I got there, they had it covered up so that I could not see the stern pipe; they had blankets and quilts or something in there.

Q. Judging from the cant there was to the shaft itself, was there enough of a cant to require the breaking of the stern pipe, or would that be accounted for by the space that would be between the shaft and the stern pipe itself?

A. Well, the opening between the two pieces of shaft, the pulling back of it, would account for the opening—would account for what opening there was.

Q. Have you not expressed the opinion here, since the accident, that you did not think the stern pipe was broken.

(Objected to, objection overruled, and defendant excepted.)

A. I told him I did not think it was broke, but it might possibly be broke. I did not know it. He asked me that question and I answered it; I said it might not have been broken.

Q. Did you not say just now you told Mr. Smith you did not think it was broken?

A. I told him I did not think it was broken; it might be, but I didn't know.

By Mr. GOULDER:

Q. Where were those siphons working that you used on the way down, the one that you used continually?

A. It was just after — the engine.

101 JOHN MCMONIGAL, called on behalf of the defendant, being sworn, testified as follows:

I was on the Wilcox at the time the Lake Erie signal was given calling her back. I was on watch, but didn't hear the signal. I was between decks, down below in the boat. When we came alongside the wind was blowing a little, not very strong though. We took the crew of the Sprague about three o'clock or a little after three, and it was after breakfast before we towed her to the beach. We had breakfast, it might be six o'clock, and it might be a little after six o'clock, that morning, on account of the confusion. I noticed her dead-lights—I could see right through from the starboard side—they were open; it was before we took her in tow. After we let go of the Sprague I guess we remained around there a half an hour; then started for Cleveland.

Q. From the time you left the rivers until you started for Cleveland, state what the weather was, whether there was anything to interfere with navigation.

A. There was not anything to interfere with us. We could go over all right, certainly. It did not interfere with vessels in tow; they sailed over to Cleveland very nicely. I know they were over here when we got over.

Cross-examination:

I could not exactly tell what time it was I saw the dead-lights open.

Q. Do you know how it was you could see the dead-lights on both sides while the captain and the other men could only see it on the starboard?

A. I was between decks; they were on deck. I did not say I seen both sides at the same time. I say I looked and I saw right
102 through, and saw the dead-lights on the port side of her. I was right abreast of her, between decks, on the Wilcox. It was right after breakfast.

Redirect examination:

The between decks that I speak of, of the Wilcox—that is, on her main deck; these dead-lights were very near on a level with me. The captain and the others were higher up on the upper deck—about eight or nine feet above the main deck.

By Judge INGERSOLL:

Q. Have you not stated, when you saw the dead-lights, you did not know whether it was after you started to tow her in or before?

A. I said it was before; I said it was after breakfast; I say it was after breakfast I noticed the dead-lights being open.

Q. Where was the captain of the Sprague at that time?

A. Well, I don't know; he went aboard twice. They were open after he got aboard. I know it was after he went aboard. I noticed them open after he came back again.

GEORGE P. MCKAY, called on behalf of the defendant, being sworn, testified as follows:

Served as master on the lakes twenty-one seasons; on steam-vessels and screw-propellers and side-wheeled vessels—principally screw-propellers. My occupation now is managing a line of vessels—Cleveland Transportion Line.

Q. Managing what feature of the business, principally?

A. The whole business of the line, including the repairs. I have seen the tug N. P. Sprague; she would class as medium size river-tug; an outside tug as distinguished from a harbor tug.

103 Q. Suppose that vessel, having a tow of three vessels, breaks down on Lake Huron, breaking her shaft between the stern pipe and driving bearing, and the stern pipe breaks, and the timber which goes across over that shaft and supports certain partitions, holds other supports and other partitions, is lifted up so it breaks these partitions above; the consequence is a leak from that stern pipe, squirting water up there in large quantities, so that four siphons and a pony pump can no more than keep it out; state to the jury whether that is a dangerous leak or what sort of a leak it is.

A. I should consider it a very dangerous leak.

Q. Now, suppose that by putting oakum in there and wrapping a quilt around, holding the edges of the quilt down some way or other with iron ore, they temporarily stopped that leak, except a stream of water comes in on the under side of the shaft as large as a man's finger; no effort is made to secure that wheel on the outside nor the broken end of the shaft on the inside; what do you say as to whether that vessel would be seaworthy in that condition?

A. I do not consider her seaworthy in that condition. I was at Port Huron in the fall of 1883 and had a vessel on the dock—that is, repair shops and dry dock also. They had facilities at Detroit for repairing boats and machinery.

Q. Suppose that the captain, having temporarily fixed up his boat as I have described, on Lake Huron, the crew put their clothing on another vessel, and the tow is taken in charge by another tug, and this broken down tug, so fixed up as I have described, is hitched on the end of the tow with an arrangement that whenever she blows a certain signal the tug towing them is to come back just as quick as she can to their relief; that in fine weather and smooth water they

104 have gone down the west shore of Lake Huron and the captain has seen fit to pass Detroit and pass Port Huron and get out on Lake Erie, about midnight of the 22nd of July; when they have gotten out perhaps fifteen or eighteen miles they have a nice southwest breeze, some sea, are making seven miles an hour, perhaps, the whole tow; suppose they find the water gaining in that tug so rapidly that all their four siphons and pony pump

will not keep it clear, when would good seamanship and prudence require the signal to be given and assistance brought back to the tug?

A. Just as soon as they discovered the water was gaining on them, I should say.

Q. What sort of seamanship would it be, after discovering that, to go on for an hour and a half without giving that signal, all the time going away from the rivers, until the water had got up perhaps so as to shut off the draft in the furnace, and they had been keeping their fires up for the purpose of working their siphons and pumps?

A. I think they would be taking a great deal of risk when they knew the water was gaining on them—carelessness on their part.

Q. After getting down perhaps twenty-five miles from the rivers what sort of seamanship is it or would it be, having called a tug back there which was entirely at their service, for the crew, including the captain, to leave the tug and stand there on such a tug as the tug Wilcox three or four hours before attempting to get her to any place of safety at all?

A. Well, I should think they would try to get her to the beach if they could not float her to get her back to the river.

Q. Now, suppose they discovered the water gaining to as an alarming extent as I have stated at one o'clock, and, running on in that time an hour and a half, the water gains about eighteen
105 inches, and then they lie by three or four hours before attempting to do anything, and let her drift there, wabble around in the sea, and then they tow her for three-quarters of an hour toward the beach and cast her off, and she has not sunk yet; what do you say as to whether they could have got that vessel to a safe place in the Detroit river, if at one o'clock, when they were fifteen or eighteen miles away, they had called this tug to their assistance and tried to get it back there?

A. I think he would try, in the first place, to get her into a safe harbor, and then if he could not get her back to the river he should beach her along towards the shore most anywhere.

Q. The point of the inquiry was whether there would be time?

A. Plenty of time; three or four hours, if she is only out of the river two hours; plenty of time to get back to the river in three or four hours, because she would go back in half the time, the tug alone, to what she would in a tow—four vessels—three vessels and a tug.

Cross-examination:

Q. You could not use the time that had already gone by to get back. There is no rule by which you can determine how soon a boat is going to sink when she begins to sink?

A. You cannot tell exactly.

Q. Can a poor man that has only run a tug for three or four seasons tell how soon a tug will sink if a man that has had twenty years' experience cannot tell?

A. Cannot tell how soon; he can have some idea about how soon

a vessel is going to sink. He may be mistaken a certain time, not mistaken four or five hours. It would be a natural desire of
106 the man managing the boat to try to get her to her home port if he thought he could. The distance from Point Pelee across to Cleveland is about fifty miles.

Q. Now, if he had come from the mouth of the Detroit river, thirty or thirty-five miles, without his vessel sinking, and then discovered the vessel sinking, and then discovered the water gaining, having before that time one siphon working, he now puts on three more at once to relieve the boat of water—now, on making that discovery should he at once have signalled for the tug to come back to his assistance before trying to see whether he could keep her clear by the use of additional siphons and pump?

A. Probably not. I suppose you would not want to pass on that very minute he put them to work, but he could very soon demonstrate whether they were gaining on the water. It would not take long.

Q. If he put on the whole force of siphons and the pony pump in addition, and found he could not control the thing in a little while, it would be about time for him to appeal for help to come back?

A. Yes, sir.

Q. Suppose that the boat had been filling so rapidly that in the course of a half or three quarters of an hour the water had deepened in the hole from three to some eighteen inches. I would ask you whether that would not justify him in getting his crew aboard the Wilcox pretty promptly when he got there?

A. I do not think it would justify them getting off the boat without a further effort to tow the tug back.

Q. Suppose the master of the Wilcox would not tow her back unless some one would stay aboard to stear her; he will have to conform to that request?

A. I suppose he would naturally find some one to stay aboard to steer her.

107 Q. Now, in the case supposed by Mr. Goulder in the original break-down, you said, on the supposition put by him as to the condition of the boat, that if the condition was as he described it the boat was in an unseaworthy condition. Will you please state the things that make up the unseaworthiness in the case he supposed?

A. The broken shaft and broken stern pipe—broken machinery.

Q. May a boat that is broken down, as far as her shaft is concerned, if there is no leakage coming from that broken shaft, any more than naturally occurs there while the shaft is actively in motion, be in fit condition to be towed across the lake, although she may not be seaworthy to tow other boats herself?

A. Yes; she may if she is not leaking.

Q. Now, if the break at the time the shaft is broken is such that *that* the captain, with some assistance and by the use of oakum and a monkey-wrench to work at the gland in front of the stern pipe, succeeds in stuffing the packing in around there and screwing it up

tight, and thereby stopping a leak which immediately on the accident required four siphons and a pony pump to clear out the water to such an extent that it only required a moderate sized siphon to keep it clear, would you not call that a pretty fair stopping of a leak?

(Objected to; objection overruled; defendant excepted.)

A. Yes, sir.

Q. Now, suppose in that condition he comes along down to Port Huron, and is himself a stranger about the shops there at Port Huron. Cleveland is his home port, and he knows there are excellent shops there for repairing a broken shaft. He has this leak under his control, as I have supposed, and the weather is fine. Is it
108 showing a lack of ordinary prudence on the part of the captain to conclude that he will come on to-morrow home as long as he is getting along as well as he is?

(Objected to, objection overruled, and defendant excepted.)

A. If he knows everything is all right, it is all right. If he is in doubt about his wheel being all right, and having secured the leak in the stern pipe, then it would be prudent for him to stop and ascertain it.

Q. I am assuming that he has been running along for fourteen hours, and during all that time he has kept the leak absolutely under his control, using one siphon not all the time; he has been able to keep the boat free of water, goes back then and finds the packing as he left it, all working right, the leak not gaining on him; is it not reasonably prudent for him to conclude that he will come on to Cleveland to the home port?

(Objected to, objection overruled, and defendant excepts.)

A. Not necessarily. I think he ought to stop and pack that stuffing-box with hemp packing when he got in the river to make doubly sure of it. He just temporarily fixed it up until he got in a harbor. After he got there he should make it sure?

Q. That is the prudence that your mind would indicate?

A. Yes, sir; I am talking about what my prudence would be.

Q. I am asking about a man of ordinary prudence who found his packing had worked well, was serving the purpose for which he put it in.

A. I understand from your questions that it was temporary, for that time, until he got to the river.

Q. Then I understand you do not believe in the doctrine of letting well enough alone?

A. I do until such time as you can make it more secure.

Q. Now, is not that question addressed to the man who is present and sees how things are working?

A. Yes; but he has a disabled boat, and he ought to make
109 it secure before he goes outside—ought to make it secure if it is not secure. If he is certain that it is all right, then it is all right.

Q. You say there are machine shops at Port Huron for mending a shaft or making a new one?

A. No, sir; I did not say that; I said there were ordinary machine shops.

By Mr. GOULDER:

Q. What is your opinion as to the proper, secure, and effectual stopping of a leak or stuffing of a box where — is a stream of water coming in on the underside of a shaft the size of your finger?

A. It is not properly packed, because they screw them up tight, so they do not leak at all when they are properly packed when the boat is lying still. They usually leak a little when the boat is running, but not in the manner indicated; a stream the size of your finger.

By Judge INGERSOLL:

Q. Did you ever have the circumstances of a broken shaft on a vessel?

A. Never had a broken shaft, but have had a broken coupling, with a broken stern pipe, stuffing-box, and all. I have had that experience in 1873 on the propeller Geneva on Lake Superior.

Q. Were you enabled to pack around that stern pipe so as to prevent leaks and get to a port of safety?

A. No, sir; we were not. The water came in all around.

By Mr. GOULDER:

Q. How long did it take her to sink?

A. She was twenty-three hours in sinking; loaded with thirty-two thousand bushels of wheat—a full cargo.

Sargeant WILLIAM LINE, called on behalf of the defendant, being sworn, testified as follows:

I am the signal officer of this port; I have a record of the weather for this place for the 22nd and 23rd of July, 1884.

Q. What is the record for the 22nd of July, 1884?

110 A. The wind on the 22nd was eight miles in the morning, twelve miles in the afternoon, and seven at night. On the 23rd it was twenty miles in the morning—that is, 7 a. m.; thirty miles maximum velocity. Those are maximum velocities I have given you. They fell from thirty miles in the afternoon—some time between the morning or afternoon, rather—to thirteen miles at night.

Q. Have you a record of the putting up of storm signals here?

A. Yes, sir.

Q. Now look at July 22nd, 1884, and see what that shows.

A. The signal was hoisted at 6.30 p. m. It was received at six thirty p. m. and hoisted at six thirty-five—five minutes after receiving the telegram.

Q. Upon what instructions, if any, do you show those signals?

(Objected to.)

A. We have a telegram from Washington giving the order. I have the original of that order here. Yes, sir; here it is; July 22nd, received at six thirty p. m. "Up signals Buffalo, Erie, Cleveland; section five—Sandusky, Toledo, Detroit; section four—Port Huron, Alpena, Mackinaw, Grand Haven; section three—Milwaukee; section one—Escanaba, Marquette, and Duluth; (signed) Hazen." There is a signal office at Detroit.

DAVID GIRARDEN, recalled, testified as follows:

By Mr. GOULDER:

Q. I wish you to state to the jury just what the captain of the Sprague said and all that he said about the condition of the vessel at the time he employed your tug to tow him.

A. I came up alongside the Sprague and I asked the captain what was the matter. He said his shaft was broken; they were in a sinking condition. The shaft had cockbilled; he thought the stern pipe had broken.

111 GILBERT NEWTON, recalled, testified as follows:

Q. What, if any, talk did you have with Captain Bowen after the Wilcox took you in tow in regard to your leak or what should be done?

(Objected to, objection sustained, and defendant excepted.)

And the foregoing was all the testimony offered by the defendant to maintain the issues on its part.

And further, to maintain the issues on his part, the plaintiff offered in evidence the following testimony in rebuttal:

Rebuttal.

WILLIAM H. MCNILLIE, called on behalf of the plaintiff, testified in rebuttal as follows:

I reside in Cleveland; lived here about 35 years; have been engaged in the running of tugs and steam vessels on the lakes sixteen or seventeen years.

Q. Over what waters have you been running—all the way between here and Detroit and Lake Huron?

A. Yes, sir; familiar with it.

Q. What do you say as to the liability of encountering logs or dead wood of any kind fifteen to twenty-five miles out from the mouth of the Detroit river?

(Objected to, objection overruled, and defendant excepted.)

A. You may strike a log; there is frequently logs through the lakes. They get drifted from rafts in that part of the lake—in most all parts of the lake for that matter.

Q. What do you say as to the wearing of the packing around the shaft in the actual use of the tug?

A. It will wear, sir.
Q. What would be the result of that wearing?
A. It would leak, more or less.

112 LOUIS P. SMITH, recalled, testified in rebuttal as follows:

Am familiar with tug running or operating.

Q. To what extent will packing wear around the shaft inside the stern pipe in the actual use of the boat?

(Objected to, objection overruled, and defendant excepted.)

A. It wears away very fast, and you have to keep screwing up on the gland; when the packing is wore out you have to renew it. The result of this wearing away of the packing is that the more you use it the more the boat leaks.

Q. So that when you are running about without any shaft broken at all, after the packing has been worn awhile, what effect does that have upon the leaking?

(Objected to, objection overruled, and defendant excepted.)

A. It allows the boat to leak.

Cross-examination:

I have been superintendent of a tug line for nearly ten years, of the harbor tug line here; I have never been master of a lake tug, but I have been master of the other tugs for the last eight years—that is, in the harbor here: I have run a tug for a month at a time; I never had charge of a tug to the upper lakes; never had charge of a tug by Sandusky.

Captain BOWEN, recalled, testified in rebuttal as follows:

Q. There has been a frequent remark made here by Mr. Goulder in regard to the putting of iron ore onto the packing that you used around the gland when you found the break there at the
113 back end of the boat. You may state whether you made use of any iron ore to do any packing with?

(Objected to.)

A. No, sir; I did not put any iron ore on quilts to hold them in place; didn't have iron ore there; didn't see any iron ore put on quilts or packing to hold them in place by anybody else; I put the packing around that gland and tightened it up; used a monkey-wrench to screw it up with.

Q. When the agent, McCloud, that has been referred to here came over to look at the boat, you may state whether you went over with him?

A. Yes, sir; I took him over to the boat; I went with a tug and took him there.

Q. What do you know, if anything, about his disposing of any other furniture or property of that boat while he was over there?

(Objected to, objection overruled, and defendant excepted.)

The COURT: I will permit it on the ground that you omitted in chief.

A. I gave those fishermen what he picked—what was washed ashore; it was bedding, buckets, life-preservers—all small things that washed ashore; I didn't count them all up to see what there was; some was in the fish shanty and some was up to the house.

Cross-examination:

McCloud lives in Buffalo, I suppose; I don't know; don't know where he is now.

Q. What had the fishermen done about this property?

A. Well, all they done was to pick it up and carry it up, some of it, in the fish shanty and some to the house; the life-preservers and a quilt or two up to the house.

Q. McCloud did not take any of it away from there, did he?

114 A. Not that I saw.

Q. (Witness produces paper.) This license was issued to you in August, after the accident, which was in July. Where have you got anything before that?

A. It is at home. I have got two more there.

(These licenses were brought in, and they, as well as one produced as above, were licenses as first-class pilot and mate of steamers on the lakes, as provided for in the Revised Statutes of United States, and their production here is waived, the witness being permitted to retain the said licenses and not further put them in evidence.

PATRICK SMITH, recalled, testified in rebuttal as follows:

Q. What is the fact about the wearing of the packing around the shaft while it is in regular use?

(Objected to, objection overruled, and defendant excepted.)

A. It wears; yes, sir.

Q. What is the result of its wearing in regard to leaking?

A. Why, it wears and it is no trouble to pack it. All you have to do is to unscrew the gland, put in some more packing, shove it into the stern pipe, and screw up the gland.

Q. Do you know what was the value of this boat?

(Objected to as immaterial.)

A. About twelve thousand dollars.

Mr. GOULDER: I object to this question and answer and move to strike them out.

The COURT: It ought to have been asked in chief.

Mr. GOULDER: I put my objection on the ground that it is utterly immaterial.

The COURT (to Judge Ingersoll): You offer it because you omitted it in chief?

Judge INGERSOLL: Yes.

115 The COURT: And Mr. Goulder moves to strike it out. I overrule the motion.

(Defendant excepted.)

Q. You told us on your direct examination that you made a transfer when you went down to make your proofs of loss of your entire interest in that tug to him at that time. Have the Union Insurance Company ever transferred back to you?

(Question objected to, objection overruled, and defendant excepted.)

A. No.

The plaintiff offered in evidence the protest of the tug that was made.

Defendant objected, objection overruled, and defendant excepted.

A copy of the protest is hereto attached, marked "B," and before said protest was read in evidence or commented upon to the jury the plaintiff's attorney withdrew the same from the evidence and told the court that plaintiff claimed nothing from it.

And the foregoing was all the testimony offered upon either side and upon both sides in the trial of said case.

And, the testimony being all in, defendant moved the court here to take the case from the jury and direct a verdict for the defendant.

Motion submitted and overruled by the court; to which ruling the defendant excepted.

116 *The Charge.*

And thereupon the court charged the jury as follows:

GENTLEMEN OF THE JURY: The plaintiff, Patrick Smith, brings his action against the defendant, The Union Insurance Company of Philadelphia, upon a policy of insurance dated the 6th of May, 1884, to the plaintiff for the sum of $7,000 upon the tug N. P. Sprague, then owned by the plaintiff, and its tackle, apparel, and furniture, insuring it from the 6th day of May, 1884, to the 10th of December, 1884, in consideration of the premium therein expressed to be paid.

In assigning the breach of said policy on behalf of the defendant the plaintiff says that during the continuance of the policy, to wit, on the 18th day of July, 1884, the said vessel, N. P. Sprague, in its regular course of business, left the port of L'Anse bound thence for the port of Cleveland, and that the said vessel was then stout, staunch, and strong and in all respects seaworthy for the voyage she was about to undertake, but while on said voyage and before the completion thereof, to wit, on the 23rd day of July, 1884, and without fault or negligence on the part of this plaintiff or those in charge and management of said tug, but solely by reason of the perils of navigation so insured against by the defendant as aforesaid, the said vessel sprung a leak, and although the plaintiff and his agents and the officers in charge of the said vessel used all reasonable endeavors to prevent said vessel from filling with water they were unable to do so, and within a short time after the dis-

covery of said leak the vessel filled with water and sank and then and there became a total loss; that promptly thereafter, to wit, on or about the 24th of July, 1884, this plaintiff caused proof of said loss to be made to the defendant in all respects as required by the provision of the said policy, and on or about said date, in compliance with the terms of the policy in case of abandonment
117 and claim for a total loss, the plaintiff caused to be made to the defendant an assignment, bill of sale, and transfer of all and every interest which he had in said tug, and made claim upon the defendant for the amount of $7,000, as provided by said policy in case of a total loss, which said abandonment and transfer of said vessel was then and there accepted by the defendant.

The plaintiff further avers that he has fully complied with all the terms and conditions of the policy by him to be performed, and has made due demand upon the defendant to pay him the sum of $7,000, as provided in said policy, but that the defendant has hitherto and still refuses to pay the same or any part thereof, whereby a cause of action has accrued to the plaintiff to have and demand of the defendant the said sum of $7,000, with interest from the 24th of July, 1884, and the plaintiff prays judgment against the defendant for the said sum of $7,000, with interest from the said 24th day of July, 1884.

The defendant by way of defense denies the allegation in the petition, except as to the execution of the policy and the residence of the defendant, and by way of special defense says that while said tug N. P. Sprague was on Lake Huron, having in tow several vessels, part of her machinery, to wit, her shaft, broke, the said breaking not being caused by stranding, collision, or the vessel being on fire, whereby said tug was completely disabled and was compelled to and did give up her tow, and was rendered unseaworthy and helpless, and was in great and constant peril of springing a leak and sinking by the working of her propeller wheel and broken shaft attached thereto, and in that condition she was picked up and by direction of her master towed to Port Huron, Michigan, which was a place of safety and at which every facility and convenient means for repairing said tug in all respects were at hand; but the plaintiff negligently failed and neglected to repair
118 or cause to be repaired said tug and negligently and without the knowledge or consent of the defendant caused her to be towed out of or away from said port of safety and repair in the unseaworthy and dangerous condition above described, and afterwards in the same condition said tug was taken in tow through and passed the port of Detroit, a place of safety, where every means and facility for repairing said tug were at hand and convenient; that the plaintiff, not regarding his duty in that behalf, negligently failed to repair or cause to be repaired said tug, and permitted her in the unseaworthy, perilous, disabled, and dangerous condition before described to be towed out of the Detroit river and out upon Lake Erie; that soon after the reaching of the lake, and meeting with a slight or ordinary swell, the said tug, by reason of her said broken machinery and by reason of her said unseaworthiness and her help-

less and dangerous condition, sprung a serious leak and was soon after sunk.

The defendant says that by reason of the premises the plaintiff never had ought to have any cause of action or claim against this defendant for or growing out of the matters set out in the petition; wherefore prays a judgment in favor of the defendant.

These pleadings form the issue that you are required to determine in the light of the proof that you have heard on this trial. To entitle the plaintiff to recover he must show that he has complied with the terms of the policy; that he has made the necessary preliminary proofs; that the vessel was lost by reason of the perils against which it was insured, and it must appear from the whole proof that the loss was not occasioned by the want of ordinary care of the master in charge of the vessel, or on account of being unseaworthy, as hereinafter stated, and not within the exceptions contained in the policy, against which the defendant did not insure the plaintiff.

119 The perils of the lake, river, etc., which the defendant took upon itself, by the terms of the policy, were such as should come to the damage of the vessel or any part thereof, excepting the incompetency of the master or insufficiency of the crew or want of ordinary care and skill in the navigation of the vessel, rottenness, and defect of the vessel and all other unseaworthiness.

The perils of the lake described and referred to by this policy of insurance denote the natural accidents peculiar to that element which do not happen by the intervention of man nor are to be prevented by human prudence.

I direct you that the breaking of the shaft, without any fault of the master or owners, was one of the perils covered by the insurance, and if the vessel had been lost by reason thereof the defendant would have been liable under the policy; so if such breaking of the shaft in Lake Huron was the cause of the Sprague sinking afterwards in Lake Erie, without the master being guilty of a want of ordinary care in the navigation of the vessel, such loss was covered by the policy of insurance. If the vessel was lost in Lake Erie from the sudden springing of a leak occasioned from some unknown cause and without the fault of the master or the owners, in the exercise of ordinary care in its navigation, and the vessel at the time it started being seaworthy, such loss would be covered by the insurance under the policy. The plaintiff, however, in such case must show that the master in control of the vessel exercised ordinary care in its management at the time that the loss occurred.

Ordinary care is such as a reasonably prudent man would exercise, and must have reference to the circumstances under which the case is required to be exercised. What would be ordinary care under some circumstances may not be at other times and under other circumstances.

120 It was generally the duty of the plaintiff to keep the Sprague in a seaworthy condition for the safe navigation of the waters in which she might be run under the policy, and when that seaworthiness, under the policy of insurance, is made and attaches, it is

presumed to exist and continue, and the burden of the proof of unseaworthiness would then be upon the defendant.

There is no claim in the defense in this case that the Sprague was not seaworthy when she started from the port of L'Anse with her tons for the port of Cleveland, but it is claimed that in Lake Huron her shaft was broken, causing a dangerous leak in the vessel, so that she was disabled and had herself to be taken in tow with the other vessels, and that she then became and was unseaworthy, and that it was the duty of the plaintiff or the master to have repaired her so as to make her seaworthy at either Port Huron or the first port at which it could be done, or at the port of Detroit, before attempting to cross Lake Erie to Cleveland, and which, it is claimed, was not done; by reason of which the vessel was lost, and therefore the defendant not liable on this policy.

The Sprague having been tem-orarily repaired by calking the leakage occasioned by the breaking or her shaft and taken in tow by the Wilcox, and in safety having reached Detroit, the question presents itself as to the duty of the master or plaintiff to have the proper repairs made there before starting on Lake Erie for her home port on Lake Erie, and, failing to do so, how does it effect the plaintiff's right to recover on this policy?

On this point I direct you that if when the Sprague arrived at Detroit the breaking of the shaft and the consequent leakage
121 therefrom was such that an ordinary prudent and discreet master of competent skill an l judgment would have deemed it necessary to repair the vessel so as to stop the leak before proceeding on the voyage to Cleveland, and you find that the sinking of the vessel and its loss was occasioned by his omission to do so and would not otherwise have happened, then the plaintiff is not entitled to recover in this suit.

But if you find from the character of the injury and the leak that a master of competent skill and judgment might reasonably have supposed in the exercise of ordinary care for the safety of the vessel that she was seaworthy for the voyage in which she was then engaged, in the manner that she was to make the trip to Cleveland in tow of the Wilcox, notwithstanding the leakage occasioned by such breaking of the shaft, and on that account omitted to make such repair at Detroit, then such omission to make such repair at Detroit is no bar to a recovery in this suit.

On the question of the competency of the master I direct you that the competency of the master is not to be determined by the want of a license to act as master of a vessel, or by the fact that the master had a license under the provisions of the statute, but it is to be determined by the skill, experience, and ability of the master in the line of his duties as master as shown in the proof.

The seaworthiness of a vessel must have reference to the character of the service to be performed and the nature and character of the voyage to be made in this case. Was the Sprague seaworthy at the time she left Detroit to be towed from Detroit to Cleveland, not to propel herself in the navigation of the lakes in the usual business of a tug, but seaworthy so as to be in a condition to be towed,

122 as the voyage was undertaken to be made in tow of the tug Wilcox?

In view of these general principles of law it will be important for you to carefully examine all of the evidence in reference to the injury and its extent, and the means used temporarily to stop the leakage and keep the vessel clear of water during the period of her trip from the place of injury to Detroit, and how it appeared to the master at Detroit and what was its condition when the vessel did arrive at Detroit.

And, as bearing upon the exercise of every *every* ordinary care by the master in reference to the continuing of the voyage without repairs, you will carefully consider the opinions of the experts in navigation who have testified to you in relation to the character of the vessel and the injury and the necessity for the safety of the vessel of repairing and the danger or absence of danger in continuing the voyage under all the circumstances of the situation. The value of this expert testimony depends very largely upon the skill, the information or knowledge, and the experience of the party who undertakes to give his opinion on any given subject. We are always required to consider the testimony of experts in different and various branches of business, and more particularly that connected with navigation upon the lakes and rivers in this country. Then the opinion of these experts depend very largely upon the truth of the hypothetical case that counsel on the one side and on the other have seen proper to put to the witnesses during their examination, and you, no doubt, have noticed in the testimony of these experts that the same expert witness in response to the hypothetical case on the one side will answer affirmatively, and to the hypothetical case put by the other side he will answer affirmatively also.

123 The value of that sort of opinion depends very largely upon the question of how the facts in this case have been established in the proof before you, and in giving weight to the testimony of experts you will be careful to ascertain what the evidence establishes as to the truth of the one or the other of these different hypothetical cases put by counsel to the witnesses on the examinations.

Then it is claimed that in Lake Erie at the time of the sudden increase of the leakage of the vessel the master did not exercise ordinary care for the safety of the vessel in not taking her to a safe port or safe place on the beach so as to prevent the loss of the vessel. I direct you that it was the duty of the master at the time to exercise ordinary care under all the circumstances to secure the safety of the vessel and to prevent the loss thereof or any greater loss than could be prevented by the exercise of such ordinary care by the master.

You will then carefully consider the evidence and all the circumstances surrounding the transaction with the evidence of the experts who have given testimony in the case and find whether the master was guilty of the want of ordinary care. If you find he did not exercise that care and dil*l*igence and the vessel was lost for the want of such care, then the plaintiff is not entitled to recover in this action.

The burden, however, to show the want of ordinary care at the time of the loss in Lake Erie must be shown by a fair preponderance of the proof on behalf of the defendant, for the reason that the defendant sets it up in his special defense in the form of a special answer, and in that respect takes upon *itself* the establishment of the affirmative of that proposition.

124 Under these general directions—and these are about all the questions of law involved in the case—you are to make your finding. So far as the matter of preliminary proofs is concerned required to be made out by the plaintiff, I do not understand that the defendant makes any great contest in reference to whether that was made or not, but *they have* denied it in the form of an answer, and you will look into the testimony and see whether that satisfactorily shows the proofs of loss *was* made to this company before this action was brought, although the paper was not present on the trial before you. Then carefully examine all the evidence, and if you find that the plaintiff has not made out all that is necessary to entitle him to recover your verdict will be in favor of the defendant, but if you find in the application of these general principles under the evidence before you that the plaintiff is entitled to recover in this action the measure of that recovery is the amount of the policy of insurance, the vessel being a total loss and having been estimated in the policy at $9,300. The measure of recovery would be the $7,000, and the plaintiff would be entitled to recover interest from the time the money became payable by the terms of the policy—sixty days after the presentation of the preliminary proofs—until the first day of the present term.

Now take the case, gentlemen, and make such a finding as will satisfy you of having correctly carried out these general principles and correctly weighed, considered, and decided the questions of fact before you.

The Defendant's Exceptions to the Charge of the Court.

1. To that portion of the charge which relates to the breaking of the shaft on Lake Huron, without any fault of the master's,

125 being a peril of the sea, and if the loss occurred from that the defendant would be liable.

2. To that portion of the charge which says the springing of a leak on Lake Erie from some unknown cause would be a peril of the sea for which the defendant would be liable.

3. To that portion of the charge which says the burden of the proof of unseaworthiness is on the defendant, and also to the statement of the charge that there is no claim on the part of the defendant — she was not seaworthy when she left L'Anse.

4. To that portion of the charge in reference to the duty of the plaintiff or master to repair at Detroit, and to that part in which the court says that if an ordinar-y prudent and skillful master would have stopped at Detroit and made repairs then it was plaintiff's duty to so stop in this case.

5. To that portion of the charge, in the same connection, in which the court directs the jury that if they find from the character of the

leak, etc., in the exercise of ordinary care the master would not stop then the defendant would be liable.

6. To that portion of the charge in reference to the license of the master.

7. To that part of the charge which says that seaworthiness must have reference to the nature of the voyage.

8. To that portion of the charge which says that the burden of proof is on the defendant to show the want of ordinary care at the time of the loss in trying to prevent the loss, because the defendant sets that up in a special plea.

126 9. To that portion of the charge in reference to the preliminary proofs having been made in this action.

10. Also to the refusal of the court to charge the requests presented by the defendant in this case, numbered 1 to 15.

11. Also to the entire charge as given.

Defendant's Requests to Charge.

1. And thereupon the defendant requested the court to give in charge to the jury the following requests:

1. "Under all the testimony in this case your verdict should be for the defendant."

2. "The burden of proving a loss of this kind is on the plaintiff. There is no presumption that the loss was caused by a peril insured against by the defendant."

3. "It was the duty of the master at Detroit, before leaving or passing for Cleveland with a crippled tug, to ascertain at the signal station what would probably be the weather in the direction of Cleveland during the time necessary to reach that point if such information could have been obtained at Detroit, and his failure to do so would be, under such circumstances, a want of ordinary care and skill."

4. "It was the duty of the plaintiff to keep the tug Sprague in a seaworthy condition for the safe performance of this trip—that
127 is, her hull must have been so tight, staunch, and strong as to be competent to resist all ordinary action of the winds and waves—and if he failed to put her in such condition at Detroit and she was lost in consequence of her failure to be in such condition on Lake Erie after passing Detroit and you find that sufficient repairs could have been made at Detroit your verdict must be for defendant."

5. "Under the policy in this case the company does not agree to indemnify the plaintiff against all damages that might happen to her in the course of navigation of a vessel or all the misfortunes that may befall her while upon the lakes, and there are excepted from the provisions of this policy and from the liability of the defendant certain risks which the defendant does not take upon itself to bear. The purport of these exceptions, so far as this case is concerned, is that the company does not undertake to insure any loss to this vessel which may be occasioned by the incompetency of the master, the

insufficiency of the crew, or want of ordinary care and skill in navigating or any unseaworthiness of any description."

6. "In order to find for plaintiff you must find that the loss of this tug was by a peril of the sea—that is, by some natural perils and operation of the elements which occurred without the intervention of human agency and which the prudence of man could not foresee nor his strength resist. Imprudence or want of skill in a master may have been unfor-seen, but it is not a fortuitous event. The insurer undertakes only to indemnify against extraordinary perils of the sea and not against those ordinary ones to which every ship must inevitably be exposed."

128 7. "It is admitted by the pleadings in this case that after the breaking of the shaft on Lake Huron the tug was towed to Port Huron, and also to Detroit, both ports of safety. This being so, if you find that the loss was occasioned by reason of unseaworthiness after leaving Detroit, the defendant is entitled to your verdict."

8. "Under the circumstances of this case, if you find that the vessel was not seaworthy when she sprung aleak on Lake Erie, your verdict must be for the defendant without reference necessarily to any question of whether the master used good or bad judgment in leaving or passing Detroit, because the plaintiff and defendant agreed in the policy that perils and losses growing out of unseaworthiness were not insured against."

9. "If you find that the loss was incurred or contributed to by the incompetency of the master or want of ordinary care and skill in navigation your verdict must be for defendant."

10. "If you find that after the danger was discovered on Lake Erie the master did not do what a competent master of ordinary prudence would do, and that by the use of ordinary skill and care under such circumstances by a competent master the tug could have been got to a place of safety and her loss presented, your verdict should be for the defendant."

11. "The fact that this tug began leaking so rapidly on Lake Erie in moderate weather so soon after leaving Detroit raises

129 a presumption that either from the effects of the accident on Lake Huron or in some other respect she was unseaworthy for the undertaking to go to Cleveland when she left Detroit, which it devolves upon the plaintiff to explain and overcome."

12. "The burden of proof is on the plaintiff in this case to show by a fair preponderance of the testimony that the sinking and loss of this tug could not have been guarded against or prevented by the ordinary exertion of human skill and prudence."

13. "In this case the words "ordinary skill" and "ordinary care" have a relative meaning. What would be ordinary care in relation to a strong, staunch, sound vessel might fall far short of ordinary care and skill in relation to a wounded vessel. What might be ordinary care and skill if the tug was seaworthy and navigating as a tug might fall far short of ordinary care when the tug is broken down and a severe and dangerous leak has been temporarily stopped. You must consider the circumstances of the case, the condition of the vessel, whether she could meet and withstand the ordinary wear

and tear and strain of the elements or required fine weather and smooth water; what means there existed of ascertaining the probable weather during the time he would be occupied in crossing Lake Erie, what precaution he took or failed to take in this respect, as well as all other circumstances"

14. "If this tug after her accident on Lake Huron was unseaworthy, and in consequence was lost on Lake Erie, her loss is
130 to be attributed to the unseaworthiness and not to the accident, provided the master had opportunity to repair the damage done on Lake Huron, and in that case your verdict must be for the defendant."

Which requests to charge were refused by the court, except so far as covered by the charge already given, to which refusal to charge the defendant excepted.

And the jury, after being charged, retired, and afterwards returned a verdict for said plaintiff against said defendant for the sum of seven thousand dollars; and the defendant having filed its motion for new trial for the reasons and causes set out in said motion, and the said circuit court having overruled said motion and entered judgment on said verdict, the said defendant excepted to the said ruling of said court overruling said motion for new trial and to said judgment, and prayed the court here to sign and seal this its bill of exceptions, and order the same to be made a part of the record in this case; all which is done and ordered as said defendant has prayed for.

M. WELKER, [SEAL.]
Dist. Judge U. S. said District.

EXHIBIT A. (Referred to at the close of the deposition of Lewis P. Smith.)

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

PATRICK SMITH, Plaintiff,

vs.

THE UNION INSURANCE COMPANY, Defendant.

131 The defendant will take notice that it is required to produce upon the trial of this action the proofs of loss, the protest, the abandonment, and all other papers and documents of any description submitted to it by the plaintiff relating to the loss claimed under the policy described in the petition herein.

BURKE, INGERSOLL AND SAUNDERS,
Attorneys for Plaintiff.

132 Know all men by these presents that we, The Union Insurance Company of the City of Philadelphia, as principal, and Henry M. Brooks and Albert R. Manning, as sureties, are held

and firmly bound unto Patrick Smith in the full and just sum of fifteen thousand one hundred thirty-eight & $\frac{66}{100}$ —, to be paid to the said Patrick Smith, his certain attorney, executors, administators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 13th day of April, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas lately at the February term, A. D. 1886, of the circuit court of the United States for the northern district of Ohio, eastern division, in a suit depending in said court between Patrick Smith, as plaintiff, and The Union Insurance Company of the City of Philadelphia, defendant, a judgment was rendered against the said The Union Insurance Company of the City of Philadelphia in the amount of seven thousand five hundred sixty-nine and $\frac{33}{100}$ —, and the said The Union Insurance Company of the City of Philadelphia having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgement in the aforesaid suit, and a citation directed to the said Patrick Smith, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said The Union Insurance Company of the City of Philadelphia shall prosecute said writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

(Signed) THE UNION INSURANCE COMPANY OF THE CITY OF PHILADELPHIA,
By HARVEY D. GOULDER. [SEAL.]
HENRY M. BROOKS. [SEAL.]
A. R. MANNING. [SEAL.]

Approved by—
M. WELKER,
Dist. Judge U. S. said District.

[Endorsed:] Patrick Smith *vs.* —— ——.

133 *Certificate.*

UNITED STATES OF AMERICA,
Northern District of Ohio, Eastern Division, } *ss:*

I, Augustus J. Ricks, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein Patrick Smith is the plaintiff and the Union Insurance Company of the City of Philadelphia is the defendant as the same appears from the files and records of said court now remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Cleveland, in said district, this 9th day of October, A. D. 1886, and in the 111th year of the Independence of the United States of America.

[Seal of the Circuit Court, North'n Dist. of Ohio.]

AUGUSTUS J. RICKS, *Clerk.*

Endorsed on cover: N. Ohio C. C. U. S. No. 787. The Union Insurance Company of the City of Philadelphia, plaintiff in error, *vs.* Patrick Smith. Filed October 16, 1886.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

THE UNION INSURANCE CO., OF THE CITY OF PHILADELPHIA, *Plaintiff in Error,*
vs.
PATRICK SMITH, *Defendant in Error.*

No. 787.

In error to the Circuit Court of the United States, for the Northern District of Ohio.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

STATEMENT.

This action was brought by Patrick Smith against the Union Insurance Company, in the Common Pleas court for Cuyahoga county, and removed by the insurance company into the Circuit Court of the United States for the Northern District of Ohio.

The suit was upon a policy of insurance issued to Patrick Smith, May 6, 1884, upon his tug, *N. P. Sprague*, then engaged in plying on Lakes Superior, Michigan, Huron, St. Clair, Erie, Ontario and the River St. Lawrence to Quebec, for the sum of $7000, upon an agreed policy value of $9334, for the tug.

The *Sprague* was what is known as a Lake tug, whose business it was to tow vessels between different ports on the great Lakes. She started from L'Anse, near Keweenaw Point, Lake Superior, with three ore laden schooners in tow, bound for Cleveland. When on Lake Huron, seventy to eighty miles above the St. Clair river, her shaft broke at a point between the stern pipe and the first bearing inside the vessel. The result was a bad leak, a dangerous leak, at the stern pipe where the shaft passes out through the hull of the vessel; and also the complete crippling of the tug, so that she was innavigable and helpless. Some oakum and quilts were then pushed into this hole around the shaft and the leak so far temporarily reduced that the stream of water coming in was about the size of a man's finger (testimony of the master, Record p. 26). The tug was drawn alongside of her tow and the clothing and effects of her crew were put on board the schooner. After a little delay another lake tug, the *Wilcox*, came up and was employed to take the tow, the *Sprague* in her crippled condition being put behind the other vessels. Steam was kept up on the *Sprague* in order that the pumps or siphons might be worked, and it was arranged that whenever the *Sprague* should blow a certain signal with her whistle the *Wilcox* should immediately come back to her assistance. The propeller wheel of the *Sprague* was submerged. No effort was made to secure the wheel outside, or the end of the broken shaft within the hull. They had pleas-

ant weather and smooth water down Lake Huron, and in this condition they towed into and past Port Huron in the early morning of July 22, and through Detroit the evening of the same day. At these places there were dry docks and, especially at Detroit, every facility for repairing. Both were ports of entire safety. With the *Sprague* in the same crippled and innavigable condition they proceeded out into Lake Erie, without having stopped at either of the ports named, or made any further examination or repair of the injured vessel. On Lake Erie that night they met a very slight sea which was not sufficient to interfere in any degree with the navigation of the tug *Wilcox* or of the other vessels. At 2 o'clock A. M. July 23, the *Sprague* blew the alarm whistle, and the *Wilcox* let go the vessels and went back to her. The *Sprague* was then about thirty miles from the mouth of the Detroit river. For over an hour the water had been gaining very rapidly, and it was up to the grate bars so as to shut off the draft in the furnace when the *Wilcox* came back. During this time the tow had been proceeding away from Detroit river at a speed of seven miles an hour. It does not appear why the signal was not given sooner, but it does appear that the *Wilcox* could have towed the Sprague back to Detroit river without any other vessel in tow at a speed of ten miles an hour (Record p. 49). When the *Wilcox* so came back she ran up close to the *Sprague* so that the crew of the latter jumped on board the *Wilcox*, which then withdrew a short

distance. There the *Wilcox* lay in plain sight of the *Sprague* for over three hours before the captain of the *Sprague* directed the *Wilcox* to take her in tow for the beach. The *Wilcox* towed her in and let go of her close to the beach, the *Sprague* still being barely afloat. She beached and afterwards in the process of time went to pieces.

Of the five men said to have been on watch on the *Sprague* from the time she began filling until the alarm was given to the *Wilcox*, four testified. Not one is able to say from what source the water came in, or to account in any manner for the increase of water. They say they did not examine the leak at the stern during that time. No one of them speaks of any unusual incident to cause this leaking; no peril of the sea or accident of any description is shown. They disclaim all knowledge as to the origin and cause of the leaking. The master, however, who was called and came on deck just before blowing the alarm, testifies that he went back and looked at the old leak at the stern, which appeared to be as temporarily repaired by him. The *Sprague* was twenty-six or twenty-seven years old, and after the breaking of the shaft the master says he could see the timbers around the stern, and they were rotten.

The policy was in this form: "Touching the adventures and perils which the said insurance company is content to bear and take upon itself by this policy, they are of the lakes, rivers, canals, fires, jettisons, that

shall come to the damage of the said vessel or any part thereof, excepting all perils, losses, misfortunes, or expenses consequent upon and arising from or caused by the following or other legally excluded causes, viz: * * incompetency of the master or insufficiency of the crew or want of ordinary care and skill in navigating said vessel, * * rottenness, inherent defects, over-loading, and all other unseaworthiness;" The policy has also a boiler clause as follows: "Boiler clause.—Unless caused by stranding, collision, or the vessel being on fire, the insured warrants this policy to to be free from any claim for loss or damage to boilers, steam pipes or machinery caused by the bursting, explosion, collapsing or breaking of the same, and to be free from any and every general average and salvage expense in consequence thereof, excepting always the expenses of getting the vessel from an exposed position to the nearest place of safety, when further expenses of above nature are not to be a claim on the insurer."

The policy contained other provisions, and it is set out in full in the Record, page 5.

Plaintiff in his petition set out the policy, and alleged that during the continuance of said policy, on the 18th day of July said vessel in the regular course of its business left L'Anse, bound to Cleveland, and "*that the said vessel was then stout, staunch and strong, and in all respects seaworthy*" for the voyage she was about to undertake; that while on said voyage on the 23d of July, "*without any fault or negligence on the part of this*

plaintiff, or those in charge, in the management of said tug, but solely by reason of the perils of navigation, so insured against by the defendant as aforesaid," the said vessel sprung a leak, and, although the plaintiff and his agents and the officers in charge of said vessel *"used all reasonable endeavors to prevent said vessel filling with water, they were unable so to do,"* and within a short time after the discovery of said leak the vessel filled with water and sank and became a total loss; that he caused proofs of loss to be made in all respects as required by the policy, and a transfer of all interest in said tug to defendant, and made a claim for the amount of insurance, as provided by the policy in case of total loss, which abandonment was then and there accepted by defendant, and that he fully complied with all the terms and conditions of said policy by him to be performed.

The answer of the insurance company admitted the character and occupation of the tug, the insurance thereon for the sum of $7000, the issuing of the policy, but denied each and every other allegation in the petition contained.

A second defense set up the breaking of the shaft on Lake Huron, rendering the tug helpless and unseaworthy, not caused by stranding, collision or fire; that she was picked up and towed to Port Huron, a place of safety and repair, yet was not there repaired; and afterwards was towed in the same condition to Detroit, a place of safety and repair, and without defendant's

knowledge or consent, the tug was towed out onto Lake Erie, and soon after, without any stress of weather, said tug sprung a leak and was sunk.

A third defense was similar to the second, except that it alleged that the plaintiff negligently failed and neglected to repair or cause to be repaired said tug, and, without defendant's knowledge or consent, caused and permitted her to be towed out in the manner described; that soon after reaching Lake Erie, on meeting with a slight and ordinary swell, the tug was lost in consequence of such condition.

Plaintiff demurred to the second defense, and this demurrer was sustained.

Plaintiff replied to the third defense, admitting that while the tug was on Lake Huron, having in tow several vessels, the shaft broke, whereby she was compelled to give up her tow, and was rendered helpless, and was in this condition, by the direction of her master, towed to Port Huron, Michigan, which was a place of safety; that said master caused her to be towed away from Port Huron, and to and away from Detroit, which was a place of safety, and that soon after reaching Lake Erie on her way to Cleveland she sprung a leak and soon after sunk, and denied all the other allegations of said third defense.

The case came on for trial at the February term, 1886, before the District Judge and a jury. Numerous exceptions were taken by the defendant to rulings of

the court, in admitting testimony for the plaintiff against the objection of the defendant and in excluding testimony offered by the defendant.

At the conclusion of plaintiff's testimony defendant moved to take the case from the jury, and at the conclusion of all the testimony defendant made a similar motion, and asked the court to direct the jury to find a verdict for the defendant, both of which motions were in their turn overruled, and defendant duly excepted.

Exceptions were duly taken by defendant to various parts of the charge, and to the charge as a whole, and to the refusal of the court to give the several instructions requested by defendant.

The jury found a verdict for the plaintiff in the sum of $7,569.33, being the full amount of the policy, with interest to the first day of the term.

Defendant thereupon filed its motion for a new trial, giving the following reasons:

First. That said verdict is against the law of the case.

Second. Said verdict is against the evidence in the case.

Third. Said verdict is against the weight of the evidence in the case.

Fourth. That the court erred on the trial of this cause in admitting testimony on the part of plaintiff, objected to by defendant at the time, to which rulings the defendant then excepted on the trial.

Fifth. That the court erred on the trial of this cause in excluding testimony offered by the defendant, to which ruling defendant at the time excepted.

Sixth. That the court erred on the trial of the said cause in refusing the several written requests to charge the jury, presented to the court by the defendant, and to which refusals the defendant excepted, as to each of said requests.

Seventh. That the court on the trial of this cause, erred in the charge to the jury in the respects pointed out in the exceptions to said charge made by defendant at the time, and the charge as a whole, to which defendant then excepted.

Eighth. That the court erred on the trial in refusing defendant's request to charge the jury to find a verdict for defendant.

Ninth. That the court erred on the trial of said cause in overruling defendant's motion to take the case from the jury at the close of plaintiff's testimony.

Tenth. That the court erred on the trial in refusing and overruling defendant's motion to take the case from the jury and direct a verdict for defendant at the close of the testimony on both sides.

Eleventh. Omitted.

Twelfth. For errors of law occurring on the trial of said cause.

This motion for a new trial was heard and overruled and judgment entered on the verdict, to which

action of the court the defendant duly excepted, and at the same term tendered its bill of exceptions, set out in the record herein, which was signed and sealed and ordered to be made a part of the record in this case. The case comes into this court by writ of error, brought to reverse the judgment of the circuit court.

ERRORS.

The Circuit Court erred in overruling the motion for a new trial above set forth, and entering judgment upon the verdict.

The motion for a new trial, so overruled, is relied on as well as the following specifications of the errors intended to be urged, which will be here designated so that they may be referred to in the subsequent argument of the same. In each instance, as will appear at the places respectively referred to in the record, the action of the court in the matters complained of was duly excepted to.

A. 1. The overruling of defendant's motion to take the case from the jury at the conclusion of plaintiff's testimony (Record p. 55).

2. The overruling of defendant's motion at the conclusion of all the evidence on both sides to take the case from the jury and direct a verdict for defendant. (Record p. 75).

B. The court erred in its rulings on evidence in the following specified particulars, shown at the pages of the record referred to in connection with each separate specification under this head.

(1.) John Bowen, master of the tug Sprague, after he had testified that he had never been licensed as master of a steam craft by the government inspectors, (Record p. 31 and p. 74,) that, although he had been engaged in the navigation of the Lakes about twenty or twenty-one years, *off and on*, the only experience he had ever had in running tugs was in occasionally taking a tug for a few days or a week around the harbor at Cleveland when he had nothing else to do; that he had run a harbor tug from Cleveland to Put-in-Bay, in Lake Erie, a few weeks in the spring of this same season, 1884, and had been captain of the Sprague about three weeks, that is, during the pending trip, (Record p. 24); was asked in reference to the towing away from Detroit:

Q. What do you say as to its being good seamanship, and prudent, to bring her through to Cleveland at that time? Objected to, overruled, and exception by defendant. A. I think it was on my part. (Record p. 27.)

(2.) a. George Ellis, who was a fireman on the Sprague, testified that he had followed the lakes about twenty-seven years and had been connected with tugs about four years. (Record p. 35.) At page 36 of the

record he said: "*I am no captain; I don't understand anything about navigation.*" And then he was permitted to answer the following expert question:

Q. State whether it would be good seamanship, and prudent, to tow the Sprague across the lake to Cleveland at the time you got ready to leave her? Objected to, overruled, and exception by defendant. (Record p. 36.)

(b.) And of the same witness the following question was asked (Record p. 35):

Q. What is the fact about whether vessels do sometimes begin to leak in a calm and when you cannot explain how the leak comes? Objected to, overruled, and exception by defendant. The answer was in the affirmative.

(3.) a. The next witness, Frank Rose, mate of the Sprague, had followed the lakes about thirty-six years, had served as second mate one season on a steam barge, had never served on tugs before (Record p. 39), and does not anywhere appear ever to have had a license as officer of a steam craft. He was asked:

Q. What do you say as to its being a matter of prudence for you to come past Port Huron, or to come past Detroit, and to try to get the tug to the home port in order to have her repaired there? The question is whether the captain exercised reasonable prudence in bringing her by. Objected to, overruled, and exception by defendant. A. I think he did (Record p. 39.)

(b.) Of the same witness (Record p. 39) the following question was permitted to be asked:

Q. When you got to Detroit state what need or occasion there was of your stopping there because of any leakage that you were not able to control, whether there was anything of that kind? Objected to, overruled, and exception by defendant. A. There was nothing any more than there had been all the way down; just the same.

(4.) The plaintiff himself testified (Record p. 54) that he had taken out master's papers, but had never sailed a boat on a salary, nor sailed regularly, but for a week or two occasionally when one of his vessels did not have a captain; but Port Huron was the farthest that he had ever gone from Cleveland in charge of a vessel of any kind, and went there but once in a tug and towed a barge back; his next farthest trips had been from Cleveland to Toledo, Conneaut and Erie. Plaintiff was asked (Record p. 53) a purely expert question as to whether, if the captain of a tug is on Lake Huron having three vessels in tow, her shaft breaks three or four feet in front of the stern post, another tug comes along and takes his tow, and he fastens his tug to the stern of the tow, finds that water is coming in but by the aid of oakum and quilts is enabled practically to shut out the water, so that by the use of a single siphon half of the time he manages to keep control of the water between there and Port Huron, a distance of

seventy or eighty miles, it is the exercise of good seamanship and prudence to continue right on to bring her to her home port in Cleveland. He was next asked a similar question as to its being prudent to keep on after reaching Detroit, and also the question, "If you could stop the leak state whether any such boat would be seaworthy?" to each of which questions the plaintiff answered in the affirmative. These questions were severally objected to, overruled, and exception taken by defendant.

(5) a. A similar question was asked of Edward Kelly, an expert, (Record p. 47,) in substance as follows: Suppose the Sprague on July 21st, 1884, was on Lake Huron seventy or eighty miles above Port Huron with a tow, she broke her shaft and was unable to take her tow, another tug was employed to take herself and tow in charge, the captain went down to the place where the shaft came through the stern post and by the aid of oakum or quilts so stopped the leak that no more water came in than could be drawn off by the siphons, in that condition found on the way down to Port Huron no difficulty in keeping the boat free from water from any source, "what do you say about his exercising his judgment to keep on in tow in that way and bring his boat home to Cleveland to have her put in order there? Whether or not it was reasonably prudent under these circumstances?" Objected to, overruled, and exception by defendant. A. "Well, if

the hull or body was in good shape, nothing wrong with that, I could not see any cause why he should not bring her here; it is ruleable to do so."

(b.) Another question put to this witness (Record pp. 47-48,) was, in substance: If at 2 or 3 o'clock in the morning on Lake Erie the water was discovered coming in, the captain went back and could not find any substantial increase by the stern pipe, that being in the same order, but she was filling from some source, notwithstanding the use of siphons and pump, whether it would be prudent to signal the Wilcox to come back and take them ashore. Objected to, overruled, and exception by defendant. The answer was to the effect that it would be the prudent course to get the assistance of a tug to take them ashore or to take them to some port.

(6.) At page 83 of the Record appears a notice to defendant to produce the proofs of loss and other papers and documents submitted to it by plaintiff relating to the loss claimed under this policy, which was served on counsel for defendant two days before the commencement of the trial. (Record p. 54.) The policy referred to in this notice, as well as the petition in the case, show that the defendant is located in the city of Philadelphia, and this case was tried in Cleveland. The court thereupon permitted the following examination of W. B. Scott, *who was agent of the Union Insurance Company in* 1884, (Record p. 50,) each of the following

questions, and the first answer being objected to, overruled, and exception taken by defendant:

Q. Will you tell us whether Mr. Smith came to your office and signed such proofs of loss as you prepared for him there? A. I made proofs of loss in the usual way and sent them forward to the company at Buffalo. Q. Who signed them? A. Patrick Smith. Q. You may state whether at the time he executed an abandonment that you had drawn up for this vessel for him. A. Yes, it was in July, 1884, I sent that in to the company.

The court also permitted (Record p. 52,) the following examination of the plaintiff, objection and exception being duly taken to each question by defendant:

Q. Who drew up the proofs of loss? A. Captain Scott. Q. You signed them? A. I signed them.

Also the following question was permitted to be asked of plaintiff (Record p. 75):

Q. You told us in your direct examination that you made a transfer when you went down to make your proofs of loss of your entire interest in the tug to him at that time; have the Union Insurance Company ever transferred back to you? Objected to, overruled, and exception by defendant. A. No.

(7.) In the examination of W. B. Scott (Record pp. 51–52), who was defendant's agent in 1884, the trial being in 1886, the following occurred:

Q. I want to ask you what the custom *is* among

insurance companies here in Cleveland in regard to employing an agent on their behalf to go around and examine the tugs in this port every spring preliminary to insuring them, so as to get the rating of the various tugs? No answer. Q. (Paper handed to witness.) Was that issued by your firm's agent in Buffalo of this company? A. Yes, sir. Q. Do you recollect where you got that valuation that was put there on the tug? A. From the underwriters' book; they have a book for the purpose of classifying all vessels, placing on them a valuation for the purpose of insurance.

The Court: Now, you may ask whether the underwriters employ a man to go around in the spring to find out the condition of the various tugs and other craft here for the sake of rating them, with a view to determining the rate of insurace to be paid. Exception by defendant.

By Judge Ingersoll: What do you say? A. They do, sir; that is for their own convenience entirely.

All which questions were separately objected to, overruled, and exception duly taken by defendant to each ruling.

(8.) In the examination of plaintiff (Record p. 54), the following question was permitted:

Q. I want to inquire if, up to the time you had hired captain Bowen and he took charge of this boat, you had any ground to suppose he did not have ordinary ability as a tug captain? Objected to, overruled,

and exception by defendant. Q. Whether you had any means of knowing that he lacked reasonable and ordinary skill? Same objection, ruling and exception. The defendant answered in substance in the negative.

(9.) Exception was also taken to the exclusion of the following question asked of defendant's witness, Newton, who was chief engineer of the tug Sprague at the time of this occurence, (Record p. 72):

Q. What if any talk did you have with Captain Bowen after the Wilcox took you in tow in regard to your leak or what should be done? Objection by plaintiff, sustained and exception by defendant.

(10.) After the defendant rested his case on the evidence, the plaintiff called in rebuttal one McNille, who had been engaged in running tugs and steam vessels sixteen or seventeen years, and the following testimony was permitted, (Record p. 72):

Q. What do you say as to the liability of encountering logs or dead wood of any kind twenty to twenty-five miles out from the mouth of Detroit river?

Objected to, overruled, and exception by defendant.

A. You may strike a log; there is frequently logs through the lakes—they get drifted from that part of the lake—most all parts of the lake for that matter.

(11.) It seems that the underwriters sent an agent, McLeod, *to examine the vessel* as she lay on the beach,

(Record p. 50). No attempt was made to show the authority of such an agent or of this particular agent, but on his rebuttal examination Captain Bowen was asked (Record p. 53):

Q. What do you know, if anything, about his disposing of any furniture or property of that boat while he was over there? Objected to, overruled, and exception by defendant.

The Court stating that he permitted it on the ground that it was omitted in chief. The answer was in substance that McLeod gave to some fishermen some bedding and small things that had washed ashore.

(12). The plaintiff (Record p. 54) against the objection and exception of defendant, was permitted to give the value of the tug.

Plaintiff was permitted to introduce in evidence the protest of the tug made soon after the disaster, to which defendant objected, objection overruled, and exception by defendant, (Record p. 75) but this having been withdrawn by plaintiff's counsel before it was read to the jury this exception should not be pressed.

C. The Court erred in its charge to the jury in giving the following instructions, as shown in the charge of the court appearing in the particular pages

specified in the sub-divisions of this head, and the defendant duly excepted to the following portions of the Court's charge to the jury.

(Record p. 77.)

1. "—I direct you that the breaking of the shaft, without any fault of the master or owners, was one of the perils covered by the insurance." * *

2. "—If the vessel was lost in Lake Erie from the sudden springing of a leak occasioned from some unknown cause and without the fault of the master or the owners, in the exercise of ordinary care in its navigation, and the vessel at the time it started being seaworthy, such loss would be covered by the insurance under the policy. The plaintiff, however, in such case must show that the master in control of the vessel exercised ordinary care in its management at the time that the loss occurred."

3. "—It was generally the duty of the plaintiff to keep the Sprague in a seaworthy condition for the safe navigation of the waters in which she might be run under the policy, and when that seaworthiness, under the policy of insurance, is made and attaches, it is presumed to exist and continue, and the burden of proof of unseaworthiness would then be on the defendant."

(Record p. 78.)

4. "—There is no claim in the defense in this case that the Sprague was not seaworthy when she started from the port of L'Anse with her tows for the port of

Cleveland, but it is claimed that in Lake Huron her shaft was broken, causing a dangerous leak in the vessel, so that she was disabled and had herself to be taken in tow with the other vessels, and that she then became and was unseaworthy."

5. "—On this point I direct you that if when the *Sprague* arrived at Detroit, the breaking of the shaft, and the consequent leakage therefrom, was such that an ordinary prudent and discreet master of competent skill, and ordinary judgment, would have deemed it necessary to repair the vessel so as to stop the leak before proceeding on the voyage to Cleveland, and you find that the sinking of the vessel and its loss was occasioned by his omission to do so and would not otherwise have happened, then the plaintiff is not entitled to recover in this suit.

But if you find from the character of the injury and the leak that a master of competent skill and judgment might reasonably have supposed in the exercise of ordinary care for the safety of the vessel that she was seaworthy for the voyage in which she was then engaged, in the manner that she was to make the trip to Cleveland in tow of the *Wilcou*, notwithstanding the leakage occasioned by such breaking of the shaft, and on that account omitted to make such repair at Detroit, then such omission to make such repair at Detroit is no bar to a recovery in this suit."

6. "—On the question of competency of the master I direct you that the competency of the master is not to

be determined by the want of a license to act as master of a vessel, or by the fact that the master had a license under the provisions of the statute, but it is to be determined by the skill, experience, and ability of the master in the line of his duties as master as shown in the proof."

7. "—The seaworthiness of a vessel must have reference to the character of the service to be performed and the nature and character of the voyage to be made in this case. Was the *Sprague* seaworthy at the time she left Detroit to be towed from Detroit to Cleveland, not to propel herself in the navigation of the lakes in the usual business of a tug, but seaworthy so as to be in a condition to be towed, as the voyage was undertaken to be made in tow of the tug *Wilcox*?"

(Record p. 79.)

8. "—Then it is claimed that in Lake Erie at the time of the sudden increase of the leakage of the vessel the master did not exercise ordinary care for the safety of the vessel in not taking her to a safe port or safe place on the beach so as to prevent the loss of the vessel. I direct you that it was the duty of the master at the time to exercise ordinary care under all the circumstances to secure the safety of the vessel and to prevent the loss thereof or any greater loss than could be prevented by the exercise of such ordinary care by the master.

9. "—The burden, however, to show the want of ordinary care at the time of the loss in Lake Erie must be

shown by a fair preponderance of the proof on behalf of the defendant, for the reason that the defendant sets it up in his special defense in the form of a special answer, and in that respect takes upon *itself* the establishment of the affirmative of that proposition."

10. "—So far as the matter of preliminary proofs is concerned, required to be made out by the plaintiff, I do not understand that the defendant makes any great contest in reference to whether that was made or not, but *they have* denied it in the form of an answer, and you will look into the testimony and see whether that satisfactorily shows the proofs of loss *was* made to this company before this action was brought, although the paper was not present on the trial before you."

Defendant also excepted to the entire charge of the court to the jury, as given. (Record p. 81.)

D. Defendant requested the court to give in charge to the jury the following requests: (Record pp. 81, 82 and 83.) here set out in full for the reason explained in the argument.

1. "Under all the testimony in this case your verdict should be for the defendant."

2. "The burden of proving a loss of this kind is on the plaintiff. There is no presumption that the loss was caused by a peril insured against by the defendant."

3. "It was the duty of the master at Detroit,

before leaving or passing for Cleveland with a crippled tug, to ascertain at the Signal Station what would probably be the weather in the direction of Cleveland during the time necessary to reach that point if such information could have been obtained at Detroit, and his failure to do so would be, under such circumstances, a want of ordinary care and skill."

4. "It was the duty of the plaintiff to keep the tug *Sprague* in a seaworthy condition for the safe performance of this trip—that is, her hull must have been so tight, staunch and strong as to be competent to resist all ordinary action of the wind and waves—and if he failed to put her in such condition at Detroit and she was lost in consequence of her failure to be in such condition on Lake Erie after passing Detroit, and you find that sufficient repairs could have been made at Detroit your verdict must be for defendant."

5. "Under the policy in this case the company does not agree to indemnify the plaintiff against all damages that might happen to her in the course of navigation of the vessel, or all the misfortunes that may befall her while upon the lakes, and there are excepted from the provisions of this policy and from the liability of the defendant certain risks which the defendant does not take upon itself to bear. The purport of these exceptions, so far as this case is concerned, is that the company does not undertake to insure any loss to this vessel which may be occasioned by the incompetency

of the master, the insufficiency of the crew, or want of ordinary care and skill in navigating, or any unseaworthiness of any description."

6. "In order to find for plaintiff, you must find that the the loss of this tug was by a peril of the sea—that is, by some natural peril and operation of the elements which occurred without the intervention of human agency, and which the prudence of man could not foresee, nor his strength resist. Imprudence or want of skill in a master may have been unforeseen, but it is not a fortuitous event. The insurer undertakes only to indemnify against extraordinary perils of the sea and not against the ordinary ones to which every ship must inevitably be exposed."

7. "It is admitted by the pleadings in this case that after the breaking of the shaft on Lake Huron the tug was towed to Port Huron, and also to Detroit, both ports of safety. This being so, if you find that the loss was occasioned by reason of unseaworthiness after leaving Detroit, the defendant is entitled to your verdict."

8. "Under the circumstances of this case, if you find that the vessel was not seaworthy when she sprung a leak on Lake Erie, your verdict must be for the defendant without reference necessarily to any question of whether the master used good or bad judgment in leaving or passing Detroit, because the plaintiff and defendant agreed in the policy that perils and losses growing out of unseaworthiness were not insured against."

9. "If you find that the loss was incurred or contributed to by the incompetency of the master or the want of ordinary care and skill in navigating your verdict must be for the defendant."

10. "If you find that after the danger was discovered on Lake Erie the master did not do what a competent master of ordinary prudence would do, and that by the use of ordinary skill and care under such circumstances by a competent master the tug could have been got to a place of safety and her loss prevented, your verdict should be for the defendant."

11. "The fact that this tug began leaking so rapidly on Lake Erie in moderate weather so soon after leaving Detroit raises a presumption that either from the effects of the accident on Lake Huron or in some other respect she was unseaworthy for the undertaking to go to Cleveland when she left Detroit, which it devolves upon the plaintiff to explain and overcome."

12. "The burden of proof is on the plaintiff in this case to show by a fair preponderance of the testimony that the sinking and loss of tug could not have been guarded against or prevented by the ordinary exertion of human skill and prudence."

13. "In this case the words "ordinary skill" and "ordinary care" have a relative meaning. What would be ordinary care in relation to a strong, staunch, sound vessel might fall far short of ordinary care and skill in relation to a wounded vessel. What might be ordinary

care and skill if the tug was seaworthy and navigating as a tug might fall far short of ordinary care when the tug is broken down and a severe and dangerous leak has been temporarily stopped. You must consider the circumstances of the case, the condition of the vessel, whether she could meet and withstand the ordinary wear and tear and strain of the elements or required fine weather and smooth water; what means there existed of ascertaining the probable weather during the time she would be occupied in crossing Lake Erie, what precaution he took or failed to take in this respect, as well as all other circumstance."

14. "If this tug after her accident on Lake Huron was unseaworthy, and in consequence was lost on Lake Erie, her loss is to be attributed to the unseaworthiness and not to the accident, provided the master had opportnnity to repair the damage done on Lake Huron, and in that case your verdict must be for the defendant."

Which requests to charge were refused by the court, except so far as covered by the charge already given, to which refusal to charge the defendant excepted.

ARGUMENT.

In this case the issue presented by the pleadings was in brief as follows:

Plaintiff averred that his tug was in all respects seaworthy on starting from L'Anse; that, *without any*

negligence, but solely by reason of the perils of navigation insured against by the defendant, she sprung a leak; that, although all reasonable endeavors were used to prevent her filling with water, within a short time after the discovery of the leak she filled, and became a total loss; and that he caused proofs of loss to be made in all respects as required by the policy.

Every one of these ellegations is distinctly put in issue by the answer. The answer goes further, and alleges that this vessel met with a mishap on Lake Huron, was thereby rendered unseaworthy, dangerous and innavigable, was in that condition towed out of two ports of perfect safety and repair, and was in consequence lost in an ordinary swell, without stress of weather.

The reply of the plaintiff admits the breaking of the shaft as stated; that the tug was so rendered helpless and gave up her tow; was towed to and past Port Huron and Detroit, places of safety; that soon after reaching Lake Erie she sprang a leak and sank, and denies all the other allegations of this defense.

SPECIFICATION A.

The Court erred in overruling defendant's motions to take the case from the jury. (Specification of Errors, A. 1 and 2.)

The plaintiff in drawing his petition attaches a copy of the policy, *and makes it by reference a part of his peti-*

tion for the purpose of showing just what was insured against, and he alleges that his loss occurred *solely by reason of the perils of navigation, so insured against by the defendant as aforesaid.* Looking then at the policy so attached, (Record, p. 5,) we find that the insurance company specifically did *not* insure against perils and losses consequent upon, and arising from, or in consequence of *incompetency of the master, want of ordinary care or skill in navigating said vessel, rottenness, inherent defects, or any other unseaworthiness.*

It will not be seriously disputed that it was incumbent on the plaintiff to show some cause, some peril insured against, by the operation of which this loss was produced. I complain that the plaintiff failed to show any peril of the sea so operating, but, instead of doing this rather tried the case and succeeded on the popular theory, that the insurance company, having received a premium, must therefore pay the loss.

I.

Notwithstanding the contrary rule which appears to obtain in England, in the law of this country there seems to be in time policies, an implied warranty of seaworthiness, where the vessel, at the time of the taking out of insurance, is in a port where repairs can be made. So held in *Hoxie vs. The Pacific Mutual Insurance Co.*, 7 *Allen*, 211, (1863,) where are considered the leading English cases of Gibson vs. Small (4 H. L. Cases, 353), and Thompson vs. Hopper (6 Ellis and

Bl., 172), and the whole Court concurring, Bigelow, J., delivered an elaborate and exhaustive opinion.

To the same effect see *Rouse vs. Insurance Co. 3 Wall, Jr. 370* (1862,) in which Grier, J., reviews the English cases, and particularly the two above referred to. *Hoxie vs. The Home Insurance Co. 32 Conn. 22*, (1863.) *Lapene vs. Sun Insurance Co. 8 La. Ann. 2.*

And a *duty* but not a technical *warranty* to *keep* the vessel seaworthy continues after the policy has attached, according to the established law of this country.

In *Copeland vs. The New England Insurance Co. 2 Metc. 432*, the Court say: * * * * "Upon these principles and authorities we consider it a rule of the law of insurance, as settled here, that, in addition to the implied warranty which applies to the state of the vessel at the commencement of the voyage, and must be strictly complied with as a condition precedent, it is the duty of the assured, from time to time during the voyage, to repair her and keep her in suitable condition for the service in which she is engaged, and, if they fail to do so, and a loss happens, which is attributable to that cause, the assured, and not the underwriters, must sustain it."

In *Capen vs. The Washington Insurance Co., 12 Cush. 157*, at page *540* the Court say:

"The rule there suggested" (*Paddock vs. Franklin Insurance Co., 11 Pick. 233,*) "was that it was the duty of the insured, after the policy had once attached, to make his vessel seaworthy, that is, tight, staunch and

strong, as far as practicable at each stage of the voyage; but that such duty was not a technical warranty, the breach of which would terminate the policy; but merely a duty, the failure of which would discharge the underwriter from any loss arising from such lack of repair. But that opinion, not being necessary to the decision of that case, was left open for future consideration. The Court are now of the opinion that this view was correct, and that it is strictly applicable to the present case.

In Merchants Mutual Insurance Co. vs. Sweet et al., 6 Wis. 670, which was an action upon a time policy of insurance upon the Lakes, the Court say at page 673:

"We suppose it to be a well settled rule in the law of insurance in this country, that, in addition to the implied warranty of seaworthiness which applies to the state of the vessel at the commencement of the risk or voyage, and which must be strictly complied with as a condition precedent to the policy attaching, it is also the duty of insured from time to time during the continuance of the voyage or policy to repair the vessel and keep her in a suitable condition for the service in which she is engaged; and if they fail to do so and a loss happens, which is attributable to that cause, the assured, and not the underwriters, must sustain it."

The Court, at page 675 in the same case, distinguishes between those acts of the master which are purely professional and those which he must be regarded

as performing in the character of agent of the owners; saying:

"If necessary, therefore, we might properly hold that the owners were bound by the knowledge of the condition of the vessel brought home to their agent, the master, and that, as between themselves and the underwriters they alone are responsible for his misconduct."

The rule is thus stated in 1 Parsons on Marine Insurance, 380:

"If after the risk is commenced she becomes unseaworthy by reason of an accident or peril then the policy continues to attach until she can again by reasonable endeavors be restored to a seaworthy condition. It is indeed the duty of the master, *for which the owner is responsible*, not only to do all that can be done to prevent her unseaworthiness, but all that should be done to restore her seaworthiness. If therefore she is disabled at sea, though she remains covered by the policy until she reaches a port, she must leave that port, wherever it be, in a seaworthy condition, provided she can there be made seaworthy."

On the question of whether or when the insurers are discharged by the master's non-fulfillment of such duties, Parsons says, (Vol. 1, page 381), that the master is "the representative and agent of the owner, with power and authority, and it is his duty to fulfill for him this warranty of seaworthiness, and a breach of it

by such an agent is a breach by the principal * * and generally the conclusion would be that if the ship be seaworthy in the beginning a subsequent unseaworthiness *caused by negligence or error of officers or crew*, does not take away the responsibility of the insurers, leaving it still as a rule of law that it is the duty of the master to repair unseaworthiness in the first port.

And again on the same page the learned author says:

"For, if a vessel leaves port in a seaworthy condition, becomes unseaworthy, and in that condition reaches a port in which she may be repaired or restored to a seaworthy condition, and the master neglects so to repair or to restore her, and she goes to sea still unseaworthy, and by reason of this neglect of the master to repair her is lost, it is quite well settled in this country that the insurers are not liable." In a note many authorities are cited.

In *Hazzard vs. New England Insurance Co., 1 Sumner, 218*, Judge Story said:

"If, after the commencement of the risk, any damage or loss occurred to the vessel, which rendered her unseaworthy, and the master, having made a port where such damage might be repaired, neglects to have the same repaired, and the vessel is afterward lost in consequence of such unseaworthiness, though the proximate cause of the loss be a peril of the sea, yet the ultimate and effective cause of the loss is the neglect of the master to make the repairs which would

have prevented it, and the insurer is not liable; otherwise if the loss happens from any other cause than such unseaworthiness."

This case went to the Supreme Court and was reported under the title of *Hazzard's Adm'r vs. Insurance Co., 8 Pet., 557.* The case was reversed and sent back on a distinct proposition from that above quoted, and it seems to me that the Supreme Court there approved the ruling of the Court below, on the point involved in the above quotation. At any rate they did not disapprove it.

I also refer to the able argument of Mr. Loring on this point (8 Pet.) from page 571 on.

There are two cases which ought to be considered together, and which from a superficial view might seem to be contradictory to the line of authorities quoted from. They are—

Starbuck vs. New England Ins. Co., 19 Pick. 198.

Adderly vs. The American Ins. Co., Taney's Dec. 126.

In these cases the question was not in relation to duty of the master, as a representative of the owner, to repair a known and apparent unseaworthiness of the vessel. In the first case, the vessel experienced a shock in the Pacific Ocean, in November, 1833. She continued her business of whaling until March, 1835, a period of a year and four months, not leaking more than vessels frequently do. She received some repairs

in March, 1835, but it was not deemed necessary to examine her bottom. She sailed for home, and two months later she foundered. The Court say, at page 201—

"An accident happened, in consequence of which there was much trembling of the vessel, and it was supposed that she was struck by a sword fish or a whale. If she could then have been examined, it would have been the duty of the master to have had it done, but she was on the ocean and an examination could not be made. After a long trial, however, it was found that she did not leak. Was the master bound, at all events, to heave her out when she arrived in port? We think he was merely bound to exercise sound discretion."

The report of the other case does not give the facts, and the decision is therefore of small value. It does not appear to have been very elaborately argued, nor does the Court do more than state in his opinion some propositions strictly applicable, we may presume, to the facts of that case. It seems, so far as the facts may be gathered from the requests to charge, that the vessel was leaking, perhaps more than usual; there was nothing to indicate where the leak was located, or the cause of it; a long trial on the voyage as far as Nassau had very evidently shown that the leak was not increasing and was not dangerous, and the question there was apparently as to the duty of the master to

unload the cargo and heave the vessel down and have a general examination of her bottom. But, even in such a case, Judge Taney did not hesitate to say, that, if a prudent and discreet master, of competent skill and judgment, would have deemed it necessary to have examined and repaired the leak before proceeding on the voyage, and the disaster was occasioned by his failure to do so, and would not otherwise have happened, then the plaintiff would not be entitled to recover.

I submit that neither of these cases is necessarily in conflict with the authorities which I have cited, and which undoubtedly illustrate the current and weight of authority on the subject in this country.

Further it may be said that most of the cases cited from were decided upon policies different in their terms from that on which the present suit is based, in that perils and losses consequent upon, caused by or arising from incompetency, negligence and unseaworthiness are not insured but are expressly excepted in our policy.

II.

I take it further to be the law that the plaintiff in this action was bound to prove a loss, as he alleges in his petition, by some peril of the sea insured against bp the defendant.

In the case of *Cory vs. The Boylston Insurance Co., 107 Mass. 140*, it was held that, "The burden of

proving a loss, from a cause and to an amount for which underwriters are liable, is upon the assured."

The Court per Gray, J., said at page 144 :

"By the general law of insurance, underwriters against perils of the sea, and other usual perils, do not assume the risk of ordinary perils incident to the course of the voyage."

In *Fleming vs. Marine Ins. Co., 4 Whart.* (*Pa.*) 58, the Court said at page 62—

"The next question which arises is, has the plaintiff proved any damage to have been done or occasioned to the goods insured while on the voyage, by any of those extraordinary perils or occurrences against which it was the design of the policy to protect him? Without he has made proof to this effect, he has no right to claim your verdict and cannot recover. It is not sufficient that the goods should appear to have been in a damaged state when they were landed to entitle the plaintiff to recover in this action, but it ought to appear that that damaged state was occasioned by some extraordinary disaster which occurred on the voyage, such as a violent storm or hurricane, the effects of which neither human efforts or foresight could well guard against or prevent."

In Swift vs. Union Ins. Co., 122 Mass. 573, at page *576*, the law is stated to be:

"If a ship is lost without any apparent sea damage, or accident sufficient to destroy a sound vessel, there is

a presumption that it proceeds from inherent weakness or decay. For such loss the insurer is not responsible, *and the burden of proof is on the plaintiff, as in other cases, to show that the loss occurred from a peril insured against.*"

To the same effect also—

Paddock & Field vs. Commercial Ins. Co., 104 Mass., at 528.

In the case already cited (*12 Cush. at page 538,*) the Court say :

"By this contract the underwriter * * * * undertakes to indemnify the ship owner against the extraordinary perils of navigation only, and against the dangers arising from unusual and extraordinary force of the winds and seas. The ordinary force of the winds and seas, sometimes very heavy, a vessel employed in navigation must be assumed to be sound and strong enough to bear without much damage. Against such the insurer does not indemnify. In regard to these, to use a familiar term among nautical men, the owner stands his own insurer. Of course it is both the duty and the interest of the ship owner on every occasion on which he may to put his insured vessel into a condition to encounter the force of the elements, when she is at a place and under circumstances where full repairs can be had, or otherwise to obtain such repairs as the place and circumstances will permit, to have her in such a condition of strength, soundness and equipment as to be able to encounter the ordinary force of winds

and seas. If she is not in that condition, and she suffers sea-damage, it will be impossible to say that it is not attributable in whole or in part to the insufficiency of the vessel."

See also: Jones vs. Insurance Co., 2 Wall, Jr., 278.

The rule as given in I Phillips §986 is as follows:

"Whatever risks are assumed by the underwriter, his liability is subject to two limitations: *he is not liable for the consequences of the perils assumed, except when they operate in an extraordinary degree and is liable only for loss and damage of an extraordinary kind.*"

See sections 1087, 1088 and 1089, the last section to the effect that:

"The insurers undertake to make indemnity only for damage arising from external accidents, not for that occasioned by the qualities or defects of the thing insured."

To the same effect see:

Baker vs. Manufacturers Ins. Co. 12 Gray 603.

Leftwitch vs. St. Louis Ins. Co., *5 La. Ann., p. 706.*

Heebner vs. Ins. Co., 10 Gray, 131.

Prof. Greenleaf says, 2 *Greenleaf, Ev., Sec. 385:*

"The plaintiff must also prove that the property insured was lost, and that the loss was *not remotely but immediately caused* by one of the *perils insured against.* Whether the loss, which is proved, will satisfy the averment, is a question for the Court, but the averment itself must be proved."

2 Phillips on Ins., Sec. 2079:

"*The fact of the vessel's sprining a leak*, where no extraordinary operation of any *peril insured against can have occurred* after the risk commenced, *is one ground of inference of unseaworthiness* at the beginning of the risk."

III.

Without multiplying the citation of authorities, I desire to call the attention of the Court particularly in this connection to the recent and very able opinion of Judge Brown, sitting in Circuit Court in the Eastern District of Michigan, in a case based on an insurance policy similar to that involved in this action. The case is entitled:

Richilieu & O. Nav. Co. vs. Boston Marine Ins. Co., (26 Fed. Rep., 596).

The facts are as follows: the steamer *Spartan* was running in a fog at a greater rate than that prescribed by the Canadian statute, (which was held to govern,) and also had on board a defective compass, which deceived the officers as to the course. She stranded and became a total loss. It was claimed in respect to this clause, excepting, "all perils, losses, misfortunes, or expenses consequent upon and arising from or caused by the following or other legally excluded causes, viz. * * * incompetency of the master or insufficiency of the crew or want of ordinary care and skill in navigating said vessel; * * * rottenness, inherent defects, overloading and all other unseawor-

thiness, etc.;" that the rule enforced so often in cases of collision and in actions for negligence against carriers, to-wit: "That a proved neglect to conform to the requirements of good seamanship, followed by disaster, raises the presumption that such neglect contributed to it," should not be applied in actions upon policies of insurance, for the reason that the carrier is not exempted if his negligence contributes to the loss, notwithstanding the loss itself may be occasioned by perils of the sea, while the insurer is liable wherever a peril of the sea contributes to the loss, though the ship may have been placed in such peril by the negligence of the insured.

The Court says, (page 603):

"If this were true as a universal proposition, the exception in the policy of perils and losses, consequent upon and arising from or caused by want of ordinary care and skill, would be of little or no avail, for, no matter how gross the carelessness or how direct the loss consequent thereon, if a peril of the sea intervene to produce the disaster, the company would be liable. The exception is not only of all "losses and misfortunes," but of all "perils," caused by negligence. The inference from this is that the company would be exonerated, notwithstanding the immediate loss be by a peril of the seal, if such peril arises from negligence or unseaworthiness. * * * Where the negligent act continues to be operative up to the very instant of the

loss, we find it difficult to escape the conclusion that it is a "peril caused by negligence, and by negligence alone," even if the loss itself were to be attributed to the peril rather than the negligence."

The Court then goes into a consideration of the case of:

Waters vs. Merchants Louisville Ins. Co., 11 Pet. 213, on the question of proximate and remote cause, stating that in that case the policy was general, containing no exception of this kind, and the Court held the company not liable for barratry, though liable for negligence, and that a loss by fire, intentionally set by the master and the crew, was a loss by barratry.

Judge Brown says—

"It is only within a comparatively few years that the clause exempting the underwriter from the consequences of negligences has been introduced into marine policies, and hence cases involving a construction of this clause are not numerous."

At page 606 the Court says—

"It may be assumed that there is no implied warranty of seaworthiness in a time policy, and that the mere fact that the vessel is unseaworthy would not preclude a recovery in case of a loss unconnected with the defect, but the policy contains an express exception of liability for losses occasioned by this cause, and whether it was known, or unknown, would be immaterial. The exception amounts to a warranty that the

loss shall not be caused by unseaworthiness, and the ignorance of the owner of the defect in the compass would not affect his right to recover."

As I shall argue later in connection with the exception to the charge of the Court in that behalf, there is nothing in the pleadings to change the burden of proof.

IV.

Coming now to the facts which were before the Court when the motion was made at the close of all the evidence to take from the jury, I contend that the plaintiff signally failed to make a case for recovery under the terms of the policy sued on.

While it may not satisfactorily appear that the loss was caused by the leak at the stern which the tug had when she left Detroit, while indeed the one witness who attempts to say anything about this would seem to testify that this was not the cause, there is no proof that the vessel was subjected to any peril of the sea as defined by this Court.

The *Sprague* was a Lake tug, as the evidence shows, capable of towing three vessels; she was similar to the *Wilcox*, which towed these three vessels and the *Sprague* in addition at the rate of seven miles an hour, and could tow the *Sprague* alone at the rate of ten miles an hour.

The description of this vessel in the policy is a material part of the policy. She is described *as a tug*, and we insured her as a *tug*, a vessel which would be

capable of navigating herself and of towing other vessels as well, while seaworthy, and it was agreed that the owner should be his own insurer against perils as well as losses caused by unseaworthiness.

Under the boiler clause also (Record, page 6,) the policy was warranted by the insured free from any claim for loss or damage to boiler, steam pipes or machinery caused by * * breaking of the same, and to be free from general average and salvage expense in consequence thereof, excepting the expenses of getting the vessel from an exposed position to the nearest place of safety. Is it reasonable to say that where this breaking of a shaft, a part of the machinery, occurred, rendering the vessel leaky and powerless to navigate herself, she could be considered longer a tug, such as we had insured; and were not the rights of the parties to be regulated after such breaking by the very boiler clause? She was certainly in such a condition of unseaworthiness and danger as to be the proper subject of salvage services.

McConnochie vs. Kerr, 9 Fed. Rep. 50, at 55.
The Plymouth Rock, ib. 413.
The Leipsic, 10 id. 585.
The New Orleans, 23 id. 909.
The Saragossa, 1 Benedict 551.

It was supposed by the District Judge that the case of *Adderly vs. Ins. Co.*, (*Taney's Decisions,*) had a bearing upon this case, but the distinction between the

cases seems manifest. This vessel was a mere hulk, worse than that. The testimony shows that when the shaft broke it tipped up, or, as some of the witnesses expressed it, the shaft cock-billed. The second engineer says (Record, p. 44,) that the stern pipe, through which the shaft passes from the hull of the vessel out to the propeller wheel, was *broken*, that he had looked at it and saw it was broken, undoubtedly by the springing up. He testified, (Record, pp. 43, 44):

"It was in my watch the shaft broke. When I went down there the water was spurting pretty lively; it was coming in considerable, they were packing it at that time when I first went down. I remember they put some oakum in. The stern-pipe was not less than five nor more than seven feet under water. (Record p. 45.) I did glance at the break; I ran down there and glanced at it when she first broke. It is upon that I base my statement to the jury that the stern-pipe was broken. The shaft was cock-billed a little; it was out of position, as near as I can remember."

Water spurted in in great quantities so that they took "*some* quilts and oakum and stuffed in or round the shaft," to stop the leak, and even then were obliged to leave a leak, through which a stream of water as large as a man's finger was coming in at that place. (Testimony of master of *Sprague.*)

Fortunately this accident occurred in very fine weather, the water being smooth and so continuing until the vessels got into the sheltered waters of St. Clair

river. Port Huron was a place of safety and repair, but they passed down through the land-locked waters of St. Clair river and Lake St. Clair to the port of Detroit, where the facilities for repairing are unexcelled. The testimony of the Signal Service officer shows that cautionary signals had been ordered to be put up at Detroit and Cleveland at about the time the *Sprague* is said to have passed Detroit. No effort had been made to secure the propeller wheel, which was submerged, or to secure the end of the shaft where it was broken, although broken between the stern-pipe and the first bearing or journal inside.

The inevitable tendency of this, as we need no expert to tell, was that, whenever that vessel might come into a sea-way, the propeller wheel would "wabble," as one witness expresses it, having the effect to loosen up whatever might be put in about the stern pipe for the purpose of stopping the leak. It is idle to argue that the stern pipe was not broken or the hull broken at that point, since the testimony of the second engineer is explicit on that subject. (Rec. pp. 43 and 44, already quoted.) As I shall shortly show, the vessel was rotten at that point also. Certainly if there was no break there could have been no leak.

As to the condition of the timbers of this tug, the master of her testified as follows (Record p. 33):

Q. How old was that tug? A. Twenty-seven years, I believe; twenty-six or twenty-seven; I won't be certain which. Q. Your testimony is that she was

in usually good condition? A. It was as good as it had been all the season. Q. How good was that? A. Good enough to go through the Lake; good enough for fellows to bet money on. Q. Do you not know that vessel was not in good condition any time you were in it? A. No. Q. Do you not know her timbers were rotten? A. No; I don't know her timbers were rotten, for I never examined her. Q. Can you say they were not? A. I could afterwards; after she broke I could find out. Q. Was she rotten or not? A. I did not know it at the time; not until I went down there to see about the breaking, and then I saw she was a little soft. Q. By that you mean she was rotten there in the run? A. She was a little soft in the run. Q. You mean by that the wood was rotten? A. Certainly. Q. You say a little soft; I want to know what you mean? A. Rotten.

And in the first place we contend that it was not a question of discretion by any means with the master of this vessel whether he should stop at Detroit and repair this hulk, and reconvert her into the tug which we had insured, because to pass on out into the open waters of Lake Erie, with the boat in that condition and innavigable, was to entirely change the risk which we had obligated ourselves to take, by a radical change to our disadvantage of the subject of insurance. And further it is not a question for expert testimony, whether, after the tug had been towed to a place of safety and repair, defendant should or should not take

the chances involved in further navigation on the open lake, but it is a mere question of law, a question of the construction of the contract, and one of justice between the parties to the contract, whether the risk upon a tug adapted to care for herself shall be altered, without the knowledge or consent of the insurance company, into a risk upon a disabled and innavigable hulk, with a broken stern pipe, an unsecured propeller wheel attached to a shaft leading through the broken stern pipe, which is surrouneed by rotten wood, and with a dangerous leak temporarily stopped up with quilts and oakum.

The Court will see on examining the expert testimony offered by plaintiff that it relates not to the seaworthiness of the vessel, but to the prudence of keeping on with the tug in that condition, which amounts practically to the mere question of taking the chances.

In substantiation of this I refer to all the expert questions asked of these witnesses: Bowen, (Record p. 27), Ellis, (Record p. 36), Rose, (Record p. 39), Kelly, (Record p. 47), and the plaintiff himself, (Record p. 53). The one expert called by the plaintiff who we admit was qualified as an expert, to wit, Kelly, (Record p. 47), gives a qualified answer to the expert question. He says: "Well, if the hull or body was in good shape, nothing wrong with that, etc." Again, being pressed, he gives another qualified answer, saying (Record, p. 47): "I should think he was using good judgment so long as the weather was good to bring her through."

But on cross-examination (Record, p. 49), where the condition of the vessel was given as described by the second engineer, he says he would not consider her seaworthy in that condition.

The expert witnesses called for defendant, Gerardin, (Record p. 57), McGuire, (Record p. 60), and McKay, (Record p. 67), expressly and positively say that the vessel in that condition would not be seaworthy. Whatever may be said by witnesses in favor of taking chances and risks with unseaworthy and disabled craft, the policy of the law on this question is established. "The interests of commerce, of freighters and insurers all require that no unnecessary risks be taken by a vessel's continuance at sea in a disabled and dangerous condition." (*Brown, D. J., S. Dist., N. Y., McConnochie vs. Kerr*, 9 *Fed. Rep.*, 50, *at* 55.) In this case the Court says:

"Through the disabling of her machinery she (the steamer *Colon,*) was therefore no longer prepared to encounter the ordinary contingencies of navigation in the Bahamas, either in proceeding on her voyage or in seeking a place of safety. These were circumstances of danger, though not of immediate peril, which justified the *Colon* in asking help of the first vessel that appeared. They justified the captain of the *Pomona*, under his implied authority, to deviate for the purpose of salvage, in departing from her own voyage to tow the *Colon* to a safe anchorage, and consequently en-

titled the *Pomona* and her crew to a moderate salvage compensation. By the accident to the *Colon* she had become unseaworthy for navigation in those waters."

Neither the master nor the mate of this vessel was experienced and competent to have charge of her. The captain's testimony (Record p. 24,) shows that he had been engaged in the navigation of the Lakes about twenty or twenty-one years, *off and on*, was captain of this tug about three weeks, made two or three trips before up to Kelley's Island. He says, "I was mate, pilot, wheelsman, or something." Before that he had said, "I had run a tug a week or so at a time; that is all—when I would not be doing something else. Q. For how long had you done that—anything before the previous season? A. No, sir." He never had a license from the government inspectors to act as a master, although he had several to act as a mate, and his want of competency was so apparent that plaintiff's counsel undertook to show (Record p. 54,) that the plaintiff, when he hired Captain Bowen, did not have any ground to suppose that he did not have ordinary ability as a captain, which counsel was permitted to do against the objection of the defendant.

The testimony of the mate (Record, p. 39,) shows that he had been following the Lakes thirty-six years, had never served on tugs before, had been second mate on a steam barge one season, and never on any other steamer. It does not appear that he ever had a license to act as officer on a steam vessel. He could act as

second mate without a license, being in the same watch with the master, who would properly have a license.

They proceeded from Detroit, notwithstanding all the unfavorable conditions. The storm, on account of which warning signals had been displayed at Detroit as stated, and which was not a severe one, did not come on until the next day, after the *Sprague* had been abandoned on the beach. (Testimony of signal officer, Record p. 71.) When the tow reached Lake Erie there was no storm or peril of any kind. It does not appear that anything occurred in any manner to interfere with the navigation of the three schooners, or of the tug *Wilcox*. But, on the other hand, the testimony of the various witnesses of plaintiff, as well as of defendant, is that there was a fresh summer breeze with a little sea, so little in fact as not to prevent the *Wilcox*, when she was called back at 2 o'clock in the morning, coming up close to the *Sprague*, so that the crew of the latter vessel jumped directly on board the *Wilcox*. At 2 o'clock, by the time on the *Sprague*, the pre-arranged signal was blown. The master says (Record p. 28,) that at that time there were two feet of water in the forecastle, no water at all aft, and about two to two-and-a-half feet forward in the tug. (Record p. 35.) Patton, a deck-hand, says the water was up to the fire grates before the *Wilcox* got back to the *Sprague*. (Record p. 37.)

The tug was then from 25 to 30 miles below the

mouth of Detroit River, near but to the westward of Point Au Pelee.

A singular feature of this loss is that, for a period of an hour to an hour and a half before the danger signal was given, the water had been gaining very rapidly from *a leak* in that tug somewhere. Robbins, the engineer on watch says: (Record p. 44,) "For an hour and a half before the tug was abandoned the water had been gaining." Ellis, the fireman on watch, (Record page 35,) says that when the *Wilcox* was called back, "it was about 2 o'clock," and (Record p. 36,) "when I first noticed any trouble from water it was about 1 o'clock."

These men were on watch, it seems, to keep up steam on the *Sprague* for the purpose of using her siphons to throw out the water.

During this hour or hour and a half the tow was proceeding away from Detroit River, a place of perfect safety, at a speed of seven miles per hour. (Testimony of master of *Wilcox*, Record p. 56.)

The *Wilcox*, had she been called when the water began to gain, could have towed the *Sprague* alone back to Detroit River at a speed of ten miles an hour, and from the point where the leaking became serious could have taken her back in two hours' time. (Record p. 49.)

Of course, had the *Sprague* been in navigable condition, she could have covered the distance herself in less time.

The master of the *Sprague* testifies (Record, pp. 27 and 28,) that, when he called the *Wilcox*, he did not do anything toward examining his boat for about fifteen minutes, and then he went down to search for the leak, looked at this place by the stern-pipe, and found it apparently all right as he had left it on Lake Huron. He says (Record p. 34,) that there must have been a pretty good hole in her, but he could not find it. Ellis, the fireman, says (Record, p. 36,) that most of the water, as he understood, was aft. He did not know where the leak was. Robbins, engineer. (Record p. 45,) was asked how he accounted for the increase of water, and said, "I don't know anything about it; I don't know where the water came from."

It was contended, upon the testimony of the master, that he examined the place at the stern, and that the leak was from some other source on Lake Erie. And on rebuttal one McNillie was called, and, over the objection and exception of defendant, was permitted to say that floating logs are sometimes met in that as well as every other part of the Lakes. But that was not accompanied with any testimony that a vessel ever encounters a floating log to her damage on the Lakes; no instance of the kind is given or appears to have been known. Besides, there were a tug and three vessels ahead of the *Sprague*, none of which encountered or saw any logs or floating obstructions, and, if the testimony may be belived, there were five men on watch on the *Sprague*, the mate and the wheelsman, besides

the second engineer, the fireman and one deck hand. No one of these men felt any shock or saw any such obstruction, or testifies to anything in connection with such a shock or peril encountered by that tug on this occasion. No floating log was there, wherever else such an obstruction might be encountered. The *Sprague* was comparatively a small vessel, the leak which was sprung was a very serious one and gained rapidly, despite the use of their pumps and siphons. A shock sufficient to so break through any vessel would have attracted the attention of those on watch, of whom some were below, forward as well as aft.

I am not unmindful of the case of *Snethen vs. Memphis Insurance Co. 3 La. Ann.* There is no parallel between that case and the case at bar, because it was shown in that case with much minuteness just how accidents might occur in making landings and otherwise on the Mississippi river, which might not be noticed at the time. It appears from the remarks of the Court at page 475 that cogent proof was also offered to show the youth, strength and good condition of the barge.

Compare this case with *Marcy vs. Insurance Co., 11 La. Ann.* 748.

In *Talcott vs. The Commercial Insurance Co., 2 Johns.* 124, at page 128, the Court held that "The presumption of seaworthiness is founded on the benignity of the law, which will not presume a party to have violated his implied stipulation, but when a state of facts

is presented, from which a conclusion is to be deduced, in my opinion this presumption of seaworthiness deserves no consideration."

Commenting on and distinguishing the case of *Patrick vs. Hallett & Brown*, previously decided by that Court, the Court said of the distinguishing circumstances: "The second arises from the difference of age between the two vessels. The *Peggy* was but two years old when she was lost, and built of the most durable timbers, whilst the present vessel was between eight and nine years old, and certainly the presumption of latent defects from decay is much stronger in this case than in the other."

In the case at bar it was shown that the *Sprague* was twenty-six or seven years old and that her timbers were rotten.

Quoting again from the last cited case (2 *Johns.*, 124), "The third essential distinction arises from the fact that the *Peggy* was shown not only to be tight, staunch and strong when she sailed on her voyage, but to have been admitted to be so in the record by the assurers three months before her loss. There being such a material difference in the circumstances of the case relied on and this, I feel myself at liberty to inquire whether the loss of this vessel did not proceed from latent defects and not from any extraordinary and unforeseen perils of the sea. * * * From the peculiar circumstances in the case of *Patrick vs. Hallett &*

Brown, I think the presumption mentioned (of loss by inherent defects,) was countervailed; in the present case it appears to me not to be repelled; for, though the jury have found this vessel seaworthy, I think there was no legal evidence of the fact; and the conclusion, in my mind, is irresistible, that she died a natural death." And at page 130, "In the present case there is no adequate cause shown to produce the injury which led to the loss arising from extraordinary and unforeseen perils: there is not a fact counteracting the presumption of the innavigability of the vessel from internal defects, probably produced by the pressure of the cargo and the action of the seas, but without the concurrence of any other than ordinary accidents."

The Louisiana case, as well as the one last cited from, are both under the old form of policy, and did not contain the clause excepting liability for unseaworthiness, etc., as may be seen from the manner in which the cases are discussed in the opinions.

In the late case of *Berwin vs. Greenwich Ins. Co.*, 53 *N. Y. Superior Court*, 102, (1886,) it is unhesitatingly declared that "Where the policy excepts from the perils insured against those arising from rottenness, inherent defects and other unseaworthiness, the assured, to recover thereon, must show that the vessel was seaworthy when lost, either by direct proof of the fact, or by showing a cause of loss that would exclude the inference of unseaworthiness."

It is suggested in that case that, if the vessel had previously received an injury by a peril insured against, and she was unseaworthy by reason of that, and so sank without a fresh peril of the sea, the insurance company would be liable, which would doubtless be true until the vessel reached a place of safety and repair.

When the *Wilcox* came back in response to the signal all hands left the *Sprague* and went on board the *Wilcox*, and, hard as it may be to credit the statement, it is undisputed that they staid on the *Wilcox*, within five hundred feet of the *Sprague*, for over three hours before the captain of the *Sprague* gave any directions or took any measures whatever in reference to his vessel. He was looking, as a witness expresses it, to see how she would act, and he did absolutely nothing for her rescue. This is admitted by the master of the *Sprague*, (Record p. 30 and p. 34,) by the mate, (Record p. 41,) and is testified to by other witnesses called on both sides.

At the end of that time the master of the *Sprague* gave directions for the *Wilcox* to tow her in toward the beach. This was done, and she was let go, close in, still floating; but she soon after beached, and in due process of time was wrecked by subsequent storms.

When plaintiff asked his expert Kelly, (Record p. 48,) whether it was prudent to take the *Sprague* in tow for the beach, his answer, several times repeated, was

that it was proper to tow her to the beach or *some place of safety.*

Even after they had taken this disabled, helpless and unseaworthy hulk, twenty-six or twenty-seven years old, with its rotten timbers, past Detroit, and the water began to gain so rapidly when eighteen or twenty miles away from Detroit River, and even after they had continued to tow for ten miles farther with this leak gaining, whatever the source of the leak, if the master had been competent and diligent, she could have been saved. Before she sank she could in either case have been towed by the *Wilcox* back to the Detroit River, where she could have settled in shoal water in a protected place and been safe.

The testimony convincingly shows that this vessel was in the condition of unseaworthiness above claimed. While the testimony of the master shows that the leak at the stern may not have caused her to sink, there was a signal failure to show that she was lost by a peril insured against as alleged in the petition, and it affirmatively appears that no such peril was encountered, and that no such peril was in operation, so that her peril and her loss must have been occasioned by inherent defect, rottenness or unseaworthiness, combined with the incompetency of the master and his shameful want of care and skill in the navigation of the tug, before and after the increase in the leak on Lake Erie.

The floating log theory is a mere pretence which never occurred to any one until after the case was once

closed, and was then dragged in as rebuttal testimony. Whether from the leak at the stern or from some other source, this hulk, while being towed through the Lake in fine weather, filled with water and sank because she was in no condition to resist the ordinary action of the elements, against which, to use the language of the court in *Capen vs. The Washington Ins. Co.*, already cited, the owner stands his own insurer.

As remarked by an eminent judge, of a vessel, lost under similar circumstances, "she died a natural death."

Passing over all questions raised on the objections to testimony offered by the plaintiff, although we suppose it to be true that we are in strictness entitled to have the motion passed upon with reference to the competent and legal testimony introduced, we respectfully contend that the plaintiff signally failed to make a case; that the evidence given at the trial, with all the inferences which a jury could possibly draw from it, was insufficient to support a verdict for the plaintiff, and the Court should have directed a verdict for the defendant.

Schofield vs. Railway Co., 114 *U. S.* 615

B. The Court erred in its rulings on evidence in the particulars set out in Specification B of Errors.

In the testimony of John Bowen (sub-head 1 of Specification B,) the question, objected to and permitted

by the Court, was asked in reference to the towing away from Detroit, and was as follows: (Record p. 27.)

Q. What do you say as to its being good seamanship and prudent to bring her through to Cleveland?

There are two objections. 1. That this witness was not qualified as an expert. 2. That it was not the proper subject of expert testimony. The second objection, applying to the first five sub-heads of this specification, will be argued under the 5th sub-head.

To make the above question asked of Bowen permissible, the witness must somewhere be shown to have skill or learning in the matter upon which his opinion is to be asked, sufficient to entitle him to be regarded as an expert. And whether the witness is so qualified is a question for the Court to pass upon before the testimony is received.

Stephens Dig. Ev. Art. 49.

Pope vs. Filley, 9 *Fed. Rep.* 66.

Such skill or learning it is very evident this witness did not possess. He had never been licensed as master. (Rec. 71 and p. 74.) While he says he has been engaged in the navigation of the Lakes about twenty to twenty-one years, *off and on*, it does not appear in what capacity or in what kind of craft, except that for a very limited time only he had been on steamcraft. He was captain of this tug about three weeks. He made two or three trips the fall before in this tug to Kelly's Island, and says: "I was mate, pilot, wheels-

man or something; I steered." Before that, he said, he had run a tug a week or so at a time when he would not be doing anything else; had not done that any before the previous season; and before going on the *Sprague* had run the tug *Cushing* from Cleveland to Put-in-Bay a few weeks. This being his whole connection with steam-craft, and it not appearing in what manner he was connected with Lake navigation or in what capacity, if at all, he had served as an officer or seaman on vessels, it is very clear that he did not possess that skill or learning in this profeesion sufficient to entitle him to give his opinion in evidence on the question asked, which skill and learning can be gained only by long experience; nor had he acquired that skill and knowledge and experience which should be found in the master of such a vessel.

(2.)—Two expert questions were permitted to be asked and answered against our exception, of George Ellis, fireman of the *Sprague*, as follows: Q. State whether it would be good seamanship and prudent to tow the *Sprague* across the Lake to Cleveland at the time you got ready to leave her? (Record p. 36.) Q. What is the fact about whether vessels do sometimes begin to leak in a calm and when you can not explain how the leak comes? (Record p. 36.)

Ellis had said: (Record p. 36.) "*I am no captain; I don't know anything about navigation,*" before the questions were put to him. He said he had followed

the Lakes about twenty-seven years, and been connected with tugs about four years. There is nothing to show that he ever acted in any higher capacity than that of fireman, that he ever had any direction over a boat of any kind, or that he ever had any part in the navigation of a vessel of any kind further than to shovel coal into the furnace. We cannot conceive upon what theory these expert questions were permitted to be asked of and answered by this witness, unless it was considered that the Court had no duty in the premises, and that the qualification of expert witnesses was another question to be considered and passed upon by the jury.

(3.)—Frank Rose was permitted to answer the questions set out under this sub-head of Specification B. of Errors, first being asked in substance to state whether it was a matter of prudence to come past Port Huron and to come past Detroit, and whether the captain exercised reasonable prudence in bringing her by; and the other question was as to the need or occasion of stopping at Detroit. (Record p. 39.)

This witness was acting as mate of the *Sprague*, and was in charge of her on Lake Erie when the leak began gaining. It is true, he says he had followed the Lakes about thirty-six years, but it does not appear in what capacity he had ever acted, except that for one season he was a second mate of a steambarge. He had never served on tugs before this trip. (Record p. 39.)

(4.) The plaintiff himself was asked a number of expert questions, set out under this sub-head in Specification B. of Errors. It appears from his testimony (Record p. 54,) that he had never regularly followed the business of sailing on the Lakes. He made a few trips in charge of a tug, but he had not engaged in the business as a business at any time. His case may be compared with that of the bookkeeper whose testimony as an expert was rejected by Judge McCrary in the case of *Pope vs. Filley*, 9 *Fed. Rep.* 66.

(1–5.) The second objection mentioned in respect to Captain Bowen's testimony applies to all the expert testimony of the four witnesses, above discussed, as well as that of Kelly, set out in sub-head 5 of Specificarion B. of Errors, whose qualification as an expert was not disputed. The objection is, that under the form of policy on which this suit is based, it was not a question of the prudence of the captain in passing Port Huron. If the vessel, as a matter of fact, was unseaworthy, either because of her rottenness or her innavigability or of the broken and leaky condition of her stern, and if the loss was occasioned by unseaworthiness, the insurance company is not to be held liable. That was the express agreement of the parties. The issue is whether the tug was lost by a peril insured against. See above cited cases of *Richilieu & O Nav. Co. vs. Boston Marine Ins. Co.*, 26 *Fed. Rep.* 596; *Merchants Mutual Ins. Co. vs. Sweet*, 6 *Wis.* 670; *Swift vs. Union Ins. Co.*, 122 *Mass.* 573.

See also the other cases cited under the first branch of this argument.

(6). The questions set out under this sub-head of Specification B of Errors called for the contents of written instruments. There had been no proper foundation for the introduction of secondary evidence instead of the proofs of loss. The notice served to produce the proofs of loss was not a reasonable notice. The insurance company, as shown, was located in Philadelphia, the place of trial was Cleveland, and the notice was served on counsel for the insurance company on the afternoon of the second day before the trial, less than forty-eight hours before the testimony was offered. There is nothing to show where the proofs were, although it is presumed that they were at the home office of the company, if they ever in fact reached the company. There is no testimony showing that they ever reached the company. The question to plaintiff, (Record p. 75,) about a transfer made with proofs of loss, and whether the defendant ever retransferred, is open to the same objection, and it is indicative of the popular theory on which the case was tried.

(7.) The Court permitted to be asked of W. B. Scott, who was the agent in 1884 of the defendant company, the question: "What *is* the custom among insurance companies *here in Cleveland* in regard to employing an agent on their behalf to go round and examine the tugs in this port every spring preliminary

to insuring them, so as to get the rating of the various tugs?" The object of any such testimony and the effect it would have upon the jury need no exposition. This question was manifestly improper, because it did not tend to show that in 1884 there was any such custom as that inquired about, and it related to insurance companies here in Cleveland, the defendant company being a company of Philadelphia. There was no effort made and no testimony offered in connection with this to show that our insurance company was ever connected with any such custom, or had ever authorized or participated in authorizing such an examination. Nor was there any testimony to show that the *Sprague* was so examined before this policy was taken out. Even if all these necessary elements had been fully shown the testimony would have been incompetent. The parties made their contract as it is set out in plaintiff's petition, and by that their rights ought to be fixed and controlled.

The introduction of this testimony is an attempt to set aside the deliberate written contract of the parties, and, by proving a custom in 1886 of insurance companies in Cleveland to examine vessels, to annul all that part of the contract of 1884, under which this suit is brought, by which the parties agreed upon the risks to be assumed under the policy. The testimony could have no other purpose, and for that purpose it is clearly inadmissible.

In the case of *Insurance Co. vs. Wright, 15 Hall., 456*, the Court made use of this language: "Tested by these principles, the usage attempted to be set up cannot be sustained. It contradicts directly the written contract. It proposes to set aside all that was said about the rate of premium, and substitute the discretion of one of the parties to the instrument. It goes upon the assumption that all that is written in the contract, that fixes or ascertains or limits the amount that may be claimed for premium for insurance by the company, is nugatory, and that the whole field is left open and the power placed in the hands of one of the parties exclusively. No such usage can be admitted thus to contradict, vary and control this contract."

In *Partridge vs. The Insurance Co., 15 Wall., at 579*, this Court, per Mr. Justice Miller, said on this subject: "When this is confined to establishing an *implied contract*, and the knowledge of the usage is brought home to the other party, the evil is not so great. But, when it is sought to extend the doctrine beyond this, and incorporate the custom into an express contract, whose terms are reduced to writing and are expressed in language neither technical nor ambiguous, and therefore needing no such aid in its construction, it amounts to establishing the principle that a custom may add to or vary or contradict the well expressed intention of the parties made in writing. No such extension of the doctrine is consistent either

with authority or with the principles which govern the law of contracts.

(8.) The Court permitted plaintiff's counsel to ask of plaintiff (Record p. 54): "I will inquire if, up to the time you hired Captain Bowen, and he took charge of this boat, you had any ground to suppose he did not have ordinary ability as a tug captain?" and again, on the same page, the question: "Whether you had any means of knowing that he lacked reasonable and ordinary skill?"

It is expressly agreed in the policy that the insurance company shall not take upon itself any perils, losses, misfortunes or expenses consequent upon or arising from or caused by *incompetency of the master*, or want of ordinary care and skill in navigating said vessel. It is simply a matter of contract duty with the owner to see that he has a master of competent skill, and a question of his failure to observe a contract duty.

The effect of this testimony on the jury may have been to excuse the plaintiff from all responsibility for the incompetency of the master, and therefore improperly to excuse him for a breach of his duty under this contract. The testimony was manifestly improper.

See 1 Parsons on Insurance, 337.

Work vs. Leathers, 97 U. S. 379.

(9). The Court sustained the plaintiff's objection to the question asked by defendant's counsel of defendant's witness, Newton, chief engineer of the tug

Sprague at the time of this occurrence, (Record p. 72,) "What if any, talk did you have with Captain Bowen, after the *Wilcox* took you in tow, in regard to your leak or what should be done?"

It is submitted that this question is entirely proper, considering the fact that Captain Bowen was the agent and representative of the owner, in charge of the tug; that the tug had become unseaworthy, innavigable and in a dangerous condition, and was being towed to a place of safety. What he said in regard to the then existing leak and in regard to what should be done in reference to the pending situation in which they found themselves is a part of the *res gestae*.

In cases of collision the rule is broadly established. In *The Potomac, 8 Wall. 594*, this Court said: "The legality of this evidence cannot be questioned, for Courts of Admiralty have uniformly allowed the declarations of the master, in a case of collision, to be brought against the owner, on the ground that when the transaction occurred the master represented the owner, and was his agent in navigating the vessel."

Ins. Co. vs. Mosley, 8 Wall. 397. Declarations and statements of an injured party, as to the cause of his injury, and as to his present condition, were admitted, although such statements were made subsequent to the injury, upon the theory that they related to the consequences and were made while the latter subsisted and were in progress.

As held in the case of *The Potomac*, so here, the master represented the owner, and was his agent in navigating the vessel, and the testimony, or the declarations and statements of the master sought to be introduced, related to the condition of the tug after her accident on Lake Huron, and related to the subject of what should be done in respect to the tug on account of such condition. We contend that they related to the matter in hand, and were not in the nature of a narration of something in the past, the tug being in an injured condition and the statements relating to that condition, and to what was best to be done under the circumstances.

The authorities are very fully discussed in the recent case of *Waldene vs. R. R. Co. 95 N. Y. 274*, which case, however, does not go as far as this Court has gone in *Ins. Co. vs. Mosley.*

In the case of *Ins. Co. vs. Tobin*, 32 *Ohio St.*, at page 78 it was held: "The statements of a steamboat captain, made in the discharge of his duty as commander of the vessel, while she is in a sinking condition, and he is in the act of seeking aid of another to relieve her from present peril of loss, as to her perilous condition, how and where she was leaking, made under such circumstances, his statements accompanying his acts, and explanatory of them, are *res gestae*, and therefore competent testimony.

(10). In rebuttal, the plaintiff was permitted to call a witness, McNillie, and to ask him in regard to the

liability of encountering logs or dead wood of any kind twenty to twenty-five miles out from the mouth of Detroit river. There is no suggestion that this was omitted in chief, and it is not rebuttal testimony, but it would not have been competent in chief. There is no testimony in the case that any log was encountered on that occasion, or seen or dreamed of by any one of the five men who were on watch on this tug, or by any one on the other vessels. There was no testimony accompanying it to the effect that any vessel had ever been *damaged* by encountering logs in the place in question or any place on the Lakes; no testimony that losses ever do or can proceed from such a course, or that there is any peril incurred by vessels navigating the Lakes from this source.

(11). Testimony was permitted (Record p. 53,) to the effect that an agent sent by the insurance company to examine the vessel as she lay on the beach, (Record p. 50,) gave to some fishermen while he was over there some bedding and small things that had washed ashore, the Court stating that he admitted this testimony on the ground that it was omitted in chief.

The object of this testimony is apparent. It was to show some act of ownership by the insurance company, indicating a recognition of their liability to pay, by taking possession of the wreck and assuming acts of ownership over it. The testimony could not be proper without some evidence to show that this man, sent to

examine the wreck, had authority to bind the company by accepting an abandonment or by recognizing the plaintiff's loss under the policy. There is an entire absence of such testimony. It is shown (Record p. 50,) that he was sent by the insurance company to make an examination. It is not shown that he had even implied authority from his office to accept an abandonment, or what his office was.

The law is well stated in *Abbot's Trial Evidence* at page 32: "To charge a corporation upon the act of an officer or agent, it must be shown directly or presumptively, either that the act was performed while in the discharge of his ordinary duty in the usual course of business, and was within the general scope and apparent sphere of such duty, or that it was expressly authorized, or that it was performed with the knowledge and implied assent of the directors or of the corporation or its authorized officers, or was subsequently ratified by them."

See *First Nat. Bank vs. Ocean Nat. Bank*, 60 *N. Y.* 290, and cases there cited.

Hoffman vs. Hancock Ins. Co., 92 *U. S.* 161.

In Packet Co. vs. Clough 20 *Wall.*, 528, *at* 540, the Court say: "But an act done by an agent cannot be varied, qualified or explained either by his declarations, which amount to no more than a mere narrative of a past occurrence, or by an isolated conversation held, or "*an isolated act done at a later period.*"

In Insurance Co. vs. Mahone, 21 *Wall.*, 152, proof was allowed below that the general traveling agent and supervisor of the insurance company, some time after the death of the insured, and after he had made an examination of plaintiff's claim, expressed an opinion that it should be paid. The Supreme Court reversed the case on this account, saying in the opinion at page 157: "That such an opinion allowed to go to the jury must have been very hurtful to the defendant's case is manifest, and that it was inadmissible is equally clear. The opinion of an agent, based upon past occurences, is never to be received as an admission of his principal's; *and this is doubly true when the agent was not a party to these occurrences.*"

(12). The plaintiff was permitted (Record, p. 54,) to give the value of the tug in testimony, that is, the market value I presume. This he stated to be $12.000.

The object of this testimony undoubtedly was to influence the jury to believe that the tug was cheap at $7,000, the amount of insurance sued for. This was a valued policy. As we had fixed on an agreed value in the policy, and on that value insured at $7,000, it is wholly immaterial what the actual value of the vessel had been. It is no more proper for the insured to state the value in excess of the insurance than it would have been for us, on the issues of this case, to show that she was worth much less than $7,000.

C. 1. In its charge to the jury we contend that the Court fell into several serious errors, to the great prejudice of defendant in this case.

In the first place, (Record, p. 77—Specification C, sub-head 1), the Court directed the jury that the breaking of the shaft, without any fault of the master and owners, was one of the perils covered by the insurance. The boiler clause of the policy contains the specific agreement of the parties on this point. Moreover the breaking of machinery is not a peril of the sea.

1 *Phillips' Ins.* 1089. "The insurers undertake to make indemnity only for damage arising from external accidents, not for that occasioned by the qualities or defects of the thing insured.

Baker vs. Insurance Co., 12 *Gray*, 603.

Leftwich vs. Insurance Co., 5 *La. Ann*, 706.

Heebner vs. Insurance Co., 10 *Gray*, 131.

The Glenfruin L. R. 10 *P. D.* 103.

Marcy vs. Insurance Co., 11 *La. Ann* 748.

(2.) The Court further charged the jury that, if the vessel was lost on Lake Erie from the sudden springing a leak from some unknown cause, and without the fault of the master and owners, in the exercise of ordinary care in its navigation, and the vessel at the time it started being seaworthy, such loss would be covered by the insurance under the policy. Plaintiff however in such case must show that the master in

control of the vessel exercised ordinary care in its management at the time the loss occurred.

The effect of this is to say that, under the policy, in which the parties expressly agree as they did in this policy in reference to perils and losses consequent upon or caused by unseaworthiness, the insurance company was liable for a loss by unseaworthiness, provided the vessel when she started on some given trip was seaworthy. The effect is to subvert the entire contract of the parties, and to make a contract radically different from the one sued on.

See 2 *Phillips vs. Ins. Co.*, 2079.

Myers vs. Girard Ins. Co., 26 *Pa. St.*, 192.

Swift vs. Union Ins. Co., 122 *Mass.* 573.

Richilieu, &c. Co., vs. Ins. Co., 26 *Fed. Rep.*, 596, and the other cases cited in foregoing brief.

(3.) In sub-division 3 of this specification, (Record, p. 77,) it is shown that the Court charged :

"It was generally the duty of the plaintiff to keep the *Sprague* in a seaworthy condition for the safe navigation of the waters in which she might be run under the policy, and when that seaworthiness, under the policy of insurance, is made and attaches, it is presumed to exist and continue, and the burden of proof of unseaworthiness would then be upon the defendant."

This can hardly be true under the policy sued on in this case, as heretofore argued. The effect of this charge would be that, if the plaintiff by the most

general testimony in the world could show a condition of seaworthiness on leaving L'Anse, then the mere fact that his vessel was lost in the course of the voyage would put upon the insurance company the burden of proving the cause of the loss to be unseaworthiness, relieving the plaintiff from all obligation to show that there was any peril, or that the loss was in the remotest way connected with any peril insured against.

(4.) The Court charges the jury (Record, p. 78,) that there is no claim in the defense of this case that the *Sprague* was not seaworthy when she started from the port of L'Anse. It is strange that the Court overlooked the first defense in the answer, which included a denial of the allegation in the petition of the seaworthiness of the vessel when she left L'Anse.

Taking the above specifications together, the Court in effect said to the jury: "If the tug was seaworthy when she left L'Anse, and in the course of the voyage was lost, the burden of showing that it is not responsible under the policy is upon the insurance company, and, as they do not deny such seaworthiness at L'Anse, the burden in this case is on the defendant to prove that it is not liable for plaintiff's claim."

This puts out of view the issue in the case and the contract of the parties, and is not supported by the law or the reason of the case.

(5). The Court, continuing, (Record, p. 78,) says it is claimed that the vessel broke her shaft on Lake Huron, causing a dangerous leak, so that she was dis-

abled and became unseaworthy, and thereupon further charges the jury, in substance, that, if the leak was such that an ordinarily prudent and discreet master, of competent skill and ordinary judgment, would have deemed it necessary to repair, so as to stop the leak before proceeding on the voyage, and the sinking and loss were occasioned by his omission to do so, and would not otherwise have happened, the plaintiff is not entitled to recover in this suit; but, if they found the contrary of this, that on passing Detroit the vessel was seaworthy for the voyage in which she was engaged, and in the manner in which she was to make the trip, nothwithstanding the leak which was occasioned by the breaking of the shaft, and on that account she omitted to repair at Detroit, then such omission to make repair at Detroit is no bar to recovery in this suit.

I submit that this portion of the charge is contrary to the law, as heretofore argued in full.

(6). On the question of competency of the master, the Court excluded entirely from the consideration of the jury the question of having a license to act as the master of a vessel. Whether the having or not having of a license is of itself conclusive, it is certainly competent evidence to go to the jury, and to be considered by them, as one element in connection with the other facts in determining this question. If the question of license or no license has nothing to do with the question of a man's competency as master of a vessel, it

might be well enough to repeal the statutes requiring masters of steam vessels to procure such license, and subjecting owners to very heavy penalties for employing any other than a duly licensed person in that capacity. The inspectors grant such license to an applicant only after "making diligent inquiry as to his character," and after being "satisfied that his capacity, experience, habits of life and character are such as to warrant the belief that he can be safely intrusted with the duties and responsibilities of the station." *Revised Stat., Sec. 4439.*

(7). The Court further charged the jury that the seaworthiness of a vessel must have reference to the character of the service and the voyage, and then put the question, as the question to be determined in reference to this vessel's seaworthiness, whether she was seaworthy at the time she left Detroit to be towed to Cleveland.

This part of the charge sanctions the towing of the vessel and would give to the jury the impression that the owner of the tug, insured as a tug, is justified in towing her indiscriminately about the Lakes, with her machinery broken to such an extent that the tug is innavigable, without affecting the policy. The jury were in effect instructed that a crippled tug, which is being towed on the Lakes, is not required to be so seaworthy as a tug that is capable of navigating and caring for herself, and that a tug which is so crippled and

innavigable may be seaworthy out on Lake Erie. A vessel in such a condition is in a condition to receive salvage service, as has been held again and again in our Courts, because of her unseaworthiness.

McConnochie vs. Kerr, 9 Fed. Rep., 55.
The Leipsic, 10 Fed. Rep., 585.
The New Orleans, 23 Fed. Rep., 909.
The Saragossa, 1 Ben., 551.
The Glenfruin, L. R. 10 P. D., 103.

(8). The Court, without undertaking in any manner to describe ordinary care, or to show how what is termed ordinary care must vary with surrounding circumstances, (Record, p. 79,) charges the jury that it was merely the duty of the master, at the time of the sudden increase of water on Lake Erie, to exercise ordinary care, under all the circumstances, to secure the safety of the vessel and to prevent the loss thereof, or any greater loss than could be prevented by the exercise of such ordinary care by the master. I submit that this portion of the charge is misleading. Taking from the jury all consideration of the true duty of a master under such circumstances, which most assuredly was to exercise more care and energy and discretion than would be ordinary, in the common acceptation of that term which was most likely to be adopted by the jury.

(9). The Court charged that the burden to show the want of ordinary care at the time of the loss on Lake Erie was upon the defendant, and must be shown

by a fair preponderance of proof, for the reason that the defendant set it up in his special defense, in the form of a special answer, and in that behalf took *upon itself* the establishment of the affirmative of that proposition.

I submit that the effect of these pleadings is to put upon the plaintiff the burden of proof throughout this case. The effect of the answer was simply to deny the cause of action set out in the petition, to-wit: a loss within the policy, for which the defendant by the terms of its policy was liable.

In *Dayton Insurance Co. vs. Kelly*, 24 *Ohio St.* 345, it was held:

"Where the legal effect of the allegations in an answer is a mere denial of the averments in the petition, such allegations can not be regarded as new matter, which will be taken as true unless controverted by the reply." The Court say at page 358 that an answer to a petition on a contract of insurance, avering that the agent had no authority from the company to make the contract sued on, must be regarded as a denial of the averment in the petition that "the company agreed to make said insurance."

So also in *Simmons vs. Green*, 15 *Ohio St.* 104.

"In an action to recover damages for the breach of a contract, the averments in the answer setting up a different contract are immaterial, except as they operate to deny the making of the one sued on."

The rule is stated in *Bliss on Code Pleading, Sec.* 396 :

"But if the answer sets up new matter, which amounts only to a denial—as, that the act charged was committed by a third person—no reply is necessary."

(10.) The Court charged the jury that he did not understand "that the defendant makes any great contest in reference to whether preliminary proofs of loss were made or not, and you will look into the testimony and see whether that satisfactorily shows that they were made, although the paper was not present on the trial before you."

I submit in reference to this portion of the charge that there was no competent proof that any preliminary proofs of loss were made.

(11.) Defendant excepted to the charge as a whole, because it was misleading, and erroneously set before the jury the issues in the case and the principles of law, which should guide them in their deliberations. The terms of the contract of insurance were not explained to the jury. I submit this exception on the argument heretofore made on the motion to direct a verdict, and on the various specific exceptions to the charge.

D. During the argument, at the suggestion of the Court, defendant's requests to charge to the number of fourteen were handed up to the Court, before his charge to the jury had been delivered, and, being handed up in advance of the charge, they covered some of the points touched upon by the Court's charge.

They were numbered separately and specifically. (Record p. 83.) They were handed back to counsel after the jury had been charged, with the statement that the requests were refused, except so far as given in the general charge, to which defendant then excepted, and, when incorporated into the bill of exceptions, they were required to be marked as refused in a body, except so far as covered by the charge given. All the requests are therefore set out in the specification of errors.

If these requests, by reason of the manner in which they are so required to appear in the bill of exceptions, are to be taken as a series and considered as a whole, then practically they are all included in the first request, which is: "Under all the testimony in this case your verdict should be for defendant."

This charge should have been given, I insist, for the reasons urged in the argument on Specification A, on the motion to take the case from the jury and to direct a verdict.

The second request, that the burden of proving a loss of this kind is on the plaintiff, finds support in the pleadings, and in the cases already cited.

The third request relates to the duty of the master of this vessel, in reference to learning the probable weather for the night and following day when passing the Signal Station at Detroit.

The fourth request, as to the duty of the plaintiff to

keep the tug in a seaworthy condition, was but partially covered in the charge of the Court. The balance of that request, that, if the plaintiff failed to put the tug in a seaworthy condition at Detroit, and in consequence of that she was lost, the verdict should have been for defendant, is supported by *Richelieu & O. Nav. Co. vs. Ins. Co. 26 Fed. Rep. 596; Work vs. Leathers, 97 U. S. 379,* and *Capen vs. Ins. Co. 12 Cush.*

The fifth request is an explanation of the effect of this contract, as to the risks for which the Company was chargeable, a subject not properly covered in the charge of the Court, and this request should have been given to the jury.

The sixth and seventh requests are supported by authorities already presented.

The ninth and tenth requests, relating to the conduct of the master, should have properly been given to the jury.

The eleventh request is supported by *2 Phillips on Insurance, Sec. 2079,* and *Myers vs. Girard Ins. Co. 26 Pa. St. 192.*

The twelfth request is in accordance with the authorities already fully argued.

The thirteenth request should have been given, in connection with that portion of the charge relating to the duty and diligence required of the master, under the circumstances in which he found he had placed his boat.

The fourteenth request is supported by the authorities already argued in full.

The motion for a new trial should have been granted, and the Court erred in overruling it. The various grounds of the motion have been specifically argued under the various specifications of error arising upon the trial of the case.

In conclusion I submit that the form of policy used in this case has not been before this Court in any case, which involved the consideration of the questions arising in this case. The District Judge does not seem to have duly regarded the contract of the parties in his rulings upon testimony and on the motions, or in his charge to the jury, and, the motion for a new trial having been submitted and passed upon during the illness of counsel for defendant, without argument on his part, there was no new consideration of the points involved in the case upon that occasion.

Upon a fair construction of the contract of insurance, I contend that no case was made by the plaintiff, that the averments in his petition were not proven, even with the aid of the testimony which defendant endeavored to have excluded, and that for the manifest errors appearing on the record of this case, all prejudicial to the rights of defendant, the judgment of the Circuit Court should be reversed.

Respectfully submitted,

Harvey D. Goulder

Attorney for Plaintiff in Error

IN THE

Supreme Court of the United States.

October Term, 1887.

No. 787.

THE UNION INSURANCE COMPANY OF THE CITY OF PHILADELPHIA.
Plaintiff in Error.

vs.

PATRICK SMITH, Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This action in the Court below was brought originally in the Court of Common Pleas of Cuyahoga County, Ohio, by Patrick Smith against the Union Insurance Company to recover for a loss sustained upon a policy of insurance which had been issued to Smith by the said company upon his tug N. P. Sprague.

The action was removed into the Circuit Court of the United States for the Northern District of Ohio, where it

was tried at the February term, 1886, and judgment was rendered for Smith.

The petition of the plaintiff below, which will be found on page 3 of the record, sets forth that on the 6th day of May, 1884, he was the owner of the said tug Sprague and that the defendant issued its policy of insurance upon the said tug to insure her to the amount of $7,000 from noon of the 6th day of May, 1884, to noon of the 10th day of December, 1884, against the perils of the lakes, rivers, canals, fire and jettison that should come to the damage of said vessel during the continuance of said policy, which policy was marked "Exhibit A" and made a part of said petition, and is found on page 5 of the record.

The plaintiff further set forth in his petition that during the continuance of said policy, to-wit, on the 18th day of July, 1884, the said vessel Sprague in its regular course of business left port L'Anse (which is a port upon Lake Superior), bound thence to the port of Cleveland, and that *the said vessel was then stout, staunch and strong and in all respects seaworthy for the voyage she was about to undertake*, and that while on said voyage and before the completion thereof, to-wit, on the 23rd of July, 1884, and without fault or negligence on the part of this plaintiff or those in charge of the management of said tug, but solely by reason of the perils of navigation so insured against by the defendant as aforesaid, the said vessel sprung a leak, and although the plaintiff and his agents and the officers in charge of said vessel used all reasonable endeavors to prevent said vessel filling with water, they were unable to do so and within a short time after the discovery of said leak the vessel filled with water and sank and then and there became a total loss.

That promptly thereafter, to-wit, on or about the 24th day July, 1884, this plaintiff caused proof of said loss to be made

to the defendant in all respects as required by the provisions of said policy and on or about said date, in compliance with the terms of said policy in case of abandonment and a claim for a total loss, plaintiff caused to be made to the defendant an assignment and bill of sale and transfer of all and every interest which he had in said tug and made a claim upon the defendant for the amount of $7,000, as provided by said policy in case of a total loss, which said abandonment and transfer was then and there accepted by said defendant.

The plaintiff further averred that he has fully complied with all the terms and conditions of said insurance policy by him to be performed, but that defendant refuses to pay the said sum of $7,000 or any part thereof and asks for judgment with interst from the 24th day of July, 1884.

ANSWER.

The answer of the defendant, which will be found on page 16 of the record, interposed three distinct defenses.

The *first* defense *admits the character and general occupation* of the tug N. P. Sprague *as set forth in the petition*; admits that defendant insured the plaintiff in the sum of $7,000 on said tug and issued the policy set forth in the petition, but denies every other allegation in the petition contained.

The *second* defense for a further answer sets forth that the said tug, while on Lake Huron, was rendered helpless, and unseaworthy, and while in such helpless, unseaworthy and perilous condition the tug was picked up and towed to Port Huron, a place of safety and a port of repair, where every facility and convenient means of repairing said tug were at hand, but that said tug was not there repaired, but without the knowledge or consent of defendant, the said tug, in the

same helpless, unseaworthy and dangerous condition before described was towed out of and passed said port of Port Huron, and was afterwards towed in the same condition into, through and past the port of Detroit, in which last named place every facility and all convenience existed for repairing said tug and which also was a place of entire safety, and without any notice to defendant and without its knowledge or consent, the said tug being then and at all times herein before mentioned in possession and control of plaintiff and his agents, said tug was in such helpless and unseaworthy and dangerous condition towed out upon Lake Erie, not in any manner navigating as a tug, or by or with the aid of her own machinery or appliances, and soon after reaching Lake Erie, without any stress of weather, the said tug sprung a leak and was sunk.

There is no time fixed in any part of this defense, but perhaps it will not be unreasonable to assume that it was meant to apply to the time of the loss referred to in the petition.

For a *third* defense the same facts contained in the second defense were set forth with the additional averment that the plaintiff *negligently failed to repair* or caused to be repaired said tug at Port Huron and *negligently caused her to he towed out from the said port,* and in like manner negligently failed to repair her at Detroit and negligently caused her to be towed out from Detroit upon Lake Erie, and that soon after reaching Lake Erie and meeting with a slight and ordinary swell, the said tug, *by reason of her said broken machinery and by reason of her said unseaworthiness* and helpless and dangerous condition, sprung a serious leak and soon afterwards sunk.

The second defense was stricken out upon demurrer by the plaintiff and the case was tried upon the issues made by the first and third defenses.

The jury returned a verdict for the plaintiff for the full amount of his claim. The defendant below filed a motion for a new trial, which was overruled, and judgment was entered upon the verdict.

At the same term of court and on the 25th day of March, 1886, the bill of exceptions of the defendant below was filed, which commences on page 24 of the record, and presents all the questions in error that are assigned by the learned counsel for the Plaintiff in Error.

The learned counsel, in his statement of the case, assumes certain facts to exist about which there was a conflict of evidence in the course of trial, but we suppose that this Honorable Court, in accordance with its repeated rulings, will not consider such matters to determine whether the finding of the jury was with or against the preponderence of evidence and therefore we do not consider it necessary to stop and point out all the matters in dispute between ourselves and the learned counsel, contained in his opening statement of the case.

11 Wal. 564, Gregg vs. Moss.

SPECIFCATIONS OF ERROR RELIED ON.

As we understand the brief of the counsel for plaintiff in error, he has assigned the following points, though in different order, upon which he relies for the reversal of the judgment below, but we adopt this order as it is that in which the case progressed.

1. That the court below committed error in overruling objections taken by defendant below, to the testimony offered by plaintiff and also to the rejection of testimony offered by defendant.

2. That the court committed error in overruling a motion made by defendant below to take the case from the jury at the close of plaintiff's testimony.

3. That the court erred in overruling a motion made by defendant below at the close of defendant's testimony to take the case from the jury and also to direct the jury to find for fendant.

4. That the court erred in overruling objections taken by defendant below to the charge of the jury.

5. That the court erred in overruling defendant's requests to be given in charge to the jury.

6. That the court erred in overruling defendant's motion for a new trial.

The bill of exceptions, which is made part of the record, is sufficient to present some of these errors, but in regard to others, we claim that there are such defects in the bill of exceptions as will deprive the plaintiff from relying upon the same to support the errors charged.

We will consider them, however, in the order in which they have been above presented.

At the head of the bill of exceptions, found on page 24, it is merely recited that

"At the trial of this case in the Circuit Court of the "United States for the Northern District of Ohio, Eastern "Division, before Honorable Martin Welker, presiding "judge, and a jury, and at the February term, A. D. 1886, "of said court, the plaintiff, Patrick Smith, to maintain the "issue on his part introduced and offered in evidence the "following testimony, to-wit:"

Then is introduced through a number of pages the evidence given for the plaintiff and for defendent.

The first indication of any exception taken by defendant to testimony is found upon page 26 of the record, about the

middle of the page; and all that is said to indicate that an exception was taken is by the following words, expressed in parenthesis, after a question was asked, to-wit:

"Had you any acquaintance of any kind at Port Huron? (Objected to; objection overruled and defendant excepted.")

There is nothing here to indicate *when* such exception was taken. There is nothing to indicate who objected, nor is there any recital upon p. 23 of the record at the bottom, under date of March 25th, a month after the verdict, showing that any exceptions were taken during the course of the trial.

As we understand the rulings of this court, it has been made very important and essential that the bill of exceptions *shows affirmatively,* First, that the party who wishes to avail himself of the exception was the one who made the objection; and secondly, that the objection and the exception to it *were taken during the progress of the trial.*

In the *9th of Peters, page 442, Scott vs. Lloyd,* Chief Justice Marshall, in considering an objection which was sought to be made the ground of error, after presenting a question to which the defendants' counsel made the same objection, says:

"But the court overruled the objection and permitted the "question to be put; and the defendant excepts to that decis- "ion. Although the plaintiff's counsel objected to this "question, and said that he excepted to the opinion of the "court, no exception is actually prayed by the party or "signed by the judge. This court, therefore, cannot con- "sider the exception as actually taken, and must suppose it "was abandoned."

This would seem to indicate the necessity of having the record show by whom the objection was taken at the time, but what we consider of more account in the deficiency of this point in the bill of exceptions is the fact that it does not appear *when* this exception was taken by defendant. It

will appear, by looking at the record, that the trial closed by the verdict of the jury on February 24th. (See record, page 21.) The bill of exceptions was signed by the court and filed, as appears from Record, pages 23 and 83, after the defendant had filed a motion for a new trial, and the Circuit Court had overruled said motion and entered judgment on said verdict, which took place, as appears by page 23, upon the 25th of March, 1886, where is contained the entry of the overruling of the motion for a new trial and the entry of the judgment in the case.

Since this record shows that the Bill of Exceptions was signed on the 25th day of March, 1886, more than a month after the trial, and the bill of exceptions was filed on the same day, there is nothing within this bill of exceptions to show when the exception was taken by the defendant below to the testimony to which he objected, and it is perfectly consistent with everything that the record says to suppose that that exception was taken at the time that he prepared and presented his bill of exceptions, and not on the trial of the case.

Now this fails utterly to meet the requirements of the decisions of this Honorable Court, as will appear from the 110 U. S. 52, U. S. vs. Carey. This Honorable Court say:

"The rule is well established and of long standing that an "exception to be of any avail *must be taken at the trial*. It "may be reduced to form and signed afterwards, but the "fact *that it was seasonably taken must appear affirmatively* "in the record by a bill of exceptions duly allowed or other- "wise. Pnelps vs. Mayer, 15 How., 160. United States vs. "Breitling, 20 How., 252. French vs. Edwards, 13 Wal., "506. Stanton vs. Embray, 93 U. S., 548. Hunnicutt vs. "Peyton, 102 U. S., 333.

In the 3 Wal. 460, Simpson vs. Doll, which is quoted as giving a liberal extension of this rule, the record is instructive as showing what degree of certainty is required by the court

in making it "appear affirmatively" that the exception was taken *during the trial.*

In this case the portion of the record under examination is as follows, (p. 468).

"Upon this testimony the court allowed Mr. Jones to go "on and testify as to his recollection of the contents of "the letter; to which action of the court in allowing sec- "ondary evidence while the existence of better evidence was "shown, the defendants except. The witness Jones then "went on to testify," etc.

The Court say (p. 474).

"It is a fair inference from the bill of exceptions that the "defendants excepted to the introduction of secondary evi- "dence of the contents of certain letters, when the court de- "cided to admit it."

In the case at bar we have no words used showing that *after* an exception recited the *witness then* proceeded to give the further evidence noted in the record. We have nothing making it "appear affirmatively" that the defendant *objected at the trial,* or *excepted at the trial,* in any of the instances relied upon by the learned counsel for plaintiff in error.

In 102 U. S., 358, Hunnicutt vs. Peyton. The court, upon page 358, in remarking upon the time when a bill of exceptions may be filed, if it has been properly made out, use the following language:

"During the term the records of the term are before the "court for amendments in matters of form, and whether the "bill was signed as of a day after judgment, if during the "term, or antedated to a time during the trial, is a question "of form only, *if it appears that the exceptions were in fact "taken before verdict and during the progress of the trial.*"

And in the 93rd U. S., page 555, Stanton vs. Emery, admr., the court say:

"Beyond doubt the record *must show* expressly or im- "pliedly that the exception was taken and reserved by the "party *at the trial,* but it is a mistake to suppose that it has "ever been decided by this court that it must be drawn out "and signed and sealed by the judge before the jury retire "from the bar."

As the plaintiff in error has not argued this point concerning h e question already referred to on page 26 of the record, we will consider the objection which he takes upon page 27 to the following question:

"What do you say as to its being good seamanship and "prudent to bring her through to Cleveland at that time?"

If this Honorable Court shall consider that it sufficiently appears that the objection and exception were taken on the trial, we then argue that the exception was ill founded; that the witness was competent as an expert and that the testimony sought was a proper subject of expert evidence.

We do not understand where a matter inquired of is properly a subject of expert evidence, that there is any definite rule established fixing the exact amount of information, skill and education that an expert witness shall be required to possess in order to make him competent as such expert. We understand the rule to be that it is a matter for the Court to decide whether, upon the investigation made and the facts shown, he is competent to express an opinion; how much weight should be given to his opinion is a matter for the jury to determine upon all the facts disclosed with reference to his means of information, his education and the manner in which he expresses his opinion. 61 Iowa, 119, State vs. Maynes. The court say:

" Any evidence *tending* to show that a witness called as an "expert, possesses the requisite knowledge and skill to tes- "tify to the point in question, is admissible for what it is "worth."

That this question so put to the witness was one which involved nautical skill seems too plain for argument. In regard to such classes of questions the rule is laid down in "Abbott's Trial Evidence," page 500, as follows: "Experienced navigators, as well as shipwrights, are competent to express opinion on questions involving nautical skill, as to

the nature and ordinary effects of the perils to which the marine loss is attributable."

In the *95 U. S. 298, Transportation Line vs. Hope*, this Honorable Court at some length expressed its views with regard to expert evidence upon a similar question, which was as follows:

Ques. "With your experience, would it be safe or pru-
"dent for a tugboat on Chesapeake Bay or any other wide
"water to tugthree boats abreast with a high wind?"

"The witness had testified that for many years he had been
"a captain of a tug boat and was familiar with the making
"up of tows, that he was a pilot and had towed vessels on
"Long Island Sound, although he was not familiar with the
"Sound; but that he was familiar with the waters of the
"Chesapeake Bay. The witness was an expert and was called
"and testified as such. His knowledge and experience fairly
"entitled him to that position. It is permitted to ask ques-
"tions of a witness of this class which cannot be put to ordi-
"nary witnesses. It is not an objection, as is assumed, that
"he was asked a question involving the point to be decided
"by the jury. As an expert he could properly aid the jury
"by such evidence, although it would not be competent to
"be given by an ordinary witness. It is upon subjects on
"which the jury are not as well able to judge for themselves
"as is the witness, that an expert as such is expected to testify.
"Evidence of this character is often given upon subjects re-
"quiring medical knowledge and science, but it is by no
"means limited to that class of cases. It is competent
"upon the question of * * * negligence in
"moving a vessel,—Moore vs. Westervelt, 9 Bosw. (N. Y.)
"558. * * * In Walsh vs. Washington Ma-
"rine Insurance Co., 32 N. Y. 427, it was decided that
"the testimony of experienced navigators on questions involv-
"ing nautical skill was admissable. The witness in that case
"was asked to what cause the loss of the vessel was attribut-
"able, which was the point to be decided by the jury. The
"Court sustained the admission of the evidence, using this
"language:

"We entertain no doubt that those who are accustomed to
"the responsibility of command, and whose lives are spent
"on the ocean, are qualified as experts to prove the practical
"effects of cross-seas and heavy-swells, shifting winds and
"sudden squalls."

"The books give a great variety of cases in which evidence
"of this character is admissable, and we have no doubt of the
"competency of the evidence to which this objection is made."

Our learned adversary has upon page 61 of his brief instanced two other questions put to witnesses as experts, to which he takes objection.

One question concerns the point similar to that we have just argued above, and the other was a question asking, "What is the fact about whether vessels do sometimes begin to leak in a calm and when you cannot explain how the leak comes?"

The competency of this witness is first denied because the witness says at the beginning of his testimony, "I am no captain, I don't know anything about navigation."

But his evidence discloses that he has been in the business of navigation for some 25 or 26 years continuously. It certainly does not follow that because a witness may have a modest estimate of his own importance as an expert, that therefore the jury are bound to agree with him in that, any more than it would follow that the opposite character of an opinion held by a witness as an expert would be bound to control them.

As we have already suggested, we suppose how much credit is to be given to the evidence of any expert is wholly a matter for the jury to determine.

In regard to the objection that it is not competent for an expert witness to answer that leaks sometimes come upon vessels in clear weather, when it is impossible to explain how they arise; this very question was made in the 32 O. S. page 91, where a similar question, though elaborated at much greater extent, but after all containing just the gist of this inquiry, was allowed to be put and answered by an expert witness, and the Court remarked: "We discover no valid objection to this question nor to the answer so far as quoted. The nature and necessities of the case and issues authorize the introduction as competent testimony of the opinions of

persons educated by experience in the nature of perils, open and hidden, attending the navigation by steamboats, of the western rivers."

And the Court distinguished in this very case between a general question of this kind asked and a question which sought to have the witness detail the particular circumstances attending some instance of that kind, which was allowed in the Court below, and which the reviewing Court held to be erroneous, as introducing colla'eral issues.

We understand from the brief of our learned adversary, page 63, that the character of his objection taken to the testimony of other witnesses is similar to that which we have already above considered.

2. The second error which we have named in the order in which the incidents of the trial devolve them, is assigned as the overruling of the motion of defendant to take the case from the jury at the end of plaintiff's testimony.

The record of this motion is found upon page 55 of the record, in these words: "Counsel here move the Court to take the case from the jury on the ground of absence of proof of a loss of plaintiff's vessel within the policy and because there is not sufficient testimony to justify a recovery."

"The motion was overruled by the court, to which ruling the defendant duly excepted."

We think that the insertion of the words "duly excepted" will perhaps save this exception from the objection that we have previously made to the exceptions before considered pertaining to the admission of evidence. It probably appears with sufficient distinctness that the exception was made at the time of the overruling by the court, so that we will consider whether a motion to take a case from the jury at the close of

the plaintiff's evidence can be made the ground of an assignment of error, if the same be overruled by the court.

We understand that by a series of cases, beginning with the 1st Peters, 469, Doe on the Demise, etc. vs. Grimes; also 1st Peters 496, DeWolf vs. Rabaud, this Honorable Court has held that a refusal to grant a non-suit constitutes no ground for reversal in this Court.

Those decisions were followed in the 6th Peters 608, Crane vs. Lessee of Morris; 14th Howard 218, Silsby vs. Foote; 23 Howard 183, Castle vs. Bullard.

The language used in the last case is as follows: "In the first place Circuit Courts have no power to grant a peremptory non-suit against the will of the plaintiff. It was so held by this court in Elmore vs. Grimes, 1st Peters 471 and the same rule was also affirmed in DeWolf vs. Rabaud et al. 1st Peters 497. In the case last named the defendants at the trial, after the evidence of the plaintiff was closed, moved the court for a non-suit, which was denied and the defendants excepted and sued out a writ of error; but this court held that the refusal to grant the motion constituted no ground for a reversal of the judgment, remarking at the same time that a non-suit cannot be ordered in any case without the consent and acquiescence of the plaintiff."

We are unable to comprehend how this motion made to take the case away from the jury, was anything different from the motion in former times to grant a non-suit. It was certainly not the same thing as a motion to direct the jury to render a particular verdict, for when the testimony of the defendant had also been entirely put in, our learned adversary, in behalf of the defendant below, moved the court not only to take the case from the jury, but joined with it a motion to direct the jury to return a verdict for the defen-

dant, as will appear from the record, page 75, in the following language: "And the testimony being all in, defendant moved the court here to take the case from the jury and direct a verdict for the defendant," and this is the third error assigned.

This Honorable Court has on several occasions given its opinion regarding a motion to direct a jury to find specifically for one of the parties.

In the 1st Wallace 369, Schuchardt vs. Allens, the court, repeating the doctrine we have above quoted, on page 369 says:

"A Circuit Court has no authority to order a per-"emptory non-suit against the will of the plaintiff. Where "there is no dispute about facts, and the law arising upon "them is conclusive against the right of the plaintiff to re-"cover, it is proper for the court *so to instruct the jury.* If "the evidence be not sufficient to warrant a recovery, it is the "duty of the court to instruct the jury accordingly. This is "*equivalent to a demurrer to the evidence,* and such an in-"struction ought to be given whenever the evidence is not "legally sufficient to serve as a foundation of a verdict for "the plaintiff. This practice has in many of the States "superseded the ancient practice of a demurrer to evidence. "*It answers the same purpose and should be tested by the same* "*rules.* A demurrer to evidence admits not only the facts "stated therein, but also every conclusion which the jury "might fairly or reasonably infer therefrom."

In the *22 Wallace 121, Pleasants vs. Fant,* the court say,

"In the case of Parks vs. Roos, 11 Howard 362 this court " held that the practice of granting an instruction like the " present had superseded the ancient practice of demurrer to " evidence and that it answered the same purpose and *should* " *be tested by the same rules.*"

Now in the *11th Wheaton 320, Fowle vs. Com. Council, etc.,* the Court upon star page 330 remark:

"Even if the demurrer could be considered as being exclu-" sively taken to the plaintiff's evidence, it ought not to be "allowed without a distinct admission of the facts which that " evidence conduced to prove, but when the demurrer was so

"*framed as to let in the defendant's evidence* and thus to "rebut what the other side aimed to establish and to over- "throw the presumptions arising therefrom by counter pre- "sumptions, it *was the duty of the Circuit Court to overrule* "*the demurrer as incorrect and untenable in principle.*"

The reason of this then seems to be that a demurrer to the evidence or a motion to direct the jury in a case like this would not be properly taken unless every fact were admitted which the evidence offered in behalf of the plaintiff tended to prove and every fact which the defendant's contradictory evidence tended to establish was excluded, and in-as-much as this motion did not so limit itself, we understand these authorities to hold that the defendant in such a case could not *insist* upon the granting of such a motion by the court; and yet we gather from the opinion of this Honorable Court, as expressed in the 114th U. S. 188, Scoville vs. Railroad Co., that when in the opinion of the court, the testimony being all in, is so slight for the establishment of the plaintiff's claim that the court would be compelled upon a motion for a new trial to set aside a verdict rendered in favor of the plaintiff on such testimony, in such cases the court *may at its discretion* direct the jury to return a verdict for the defendant; and if it be a matter of discretion, certainly the defendant would not have the right to insist on it as error that the court refused it.

The language used in the case last cited is as follows:—

"It is the settled law of this court that when the evidence given at the trial, with all the inferences which the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but *may direct a verdict for the defendant*."

Numerous authorities are there cited in support of this rule.

4. The fourth error assigned by the learned counsel for

plaintiff in error consists of the overruling of his exceptions to the charge of the court.

We submit to this honorable court that such exceptions are improperly taken.

On page 80 of the record is found all that can be said in regard to such exceptions. There is a single line in the page marked "The defendant's exceptions to the charge of the Court."

Nothing is here contained or elsewhere to show the time at which such exceptions were taken. There is no averment that the defendant actually did except at the time of the trial to the charge of the court or any part thereof. If there were enough in this record to show that these exceptions were taken during the trial, it yet appears that one exception, to-wit, the 11th, was taken to *the entire charge* as given." This is evidently bad under rule 4th of this Honorable Court, and also as particularly decided in the *111th U. S., 148, Cooper vs. Schlessinger*. There the court remarked upon page 152, "Where a charge embraces several distinct propositions, a general exception is of no effect if any one of them is correct."

But with regard to the remaining 10 exceptions specified in the list so marked as "the defendant's exceptions to the charge of the court, (Record p. 80) no one of them points to any particular language of the court, but each objects in a general way "to that portion of the charge" which relates to a subject specified.

We suppose our learned adversary felt the force of this, and expected to make the same more specific by the manner in which he has assigned these various exceptions on page 20 of his brief, but we submit to your honors that there is no such exception taken to particular language, as is there cited on

the 20th page of the brief. On the other hand it required a careful analysis of the entire charge to find these respective portions.

While the learned counsel referred to the record page 77 as showing where will be found the portions of the court's charge which he objects to, yet there is nothing in the so-styled exceptions as incorporated in the record on page 80 which will point out what part of the charge of the court covering 5 pages of the printed record, embracing the entire charge of the court, were properly excepted to, nor is there anything to show that any of those exceptions were taken *at the time of the trial* so as to serve the object and reasonable purpose of such exceptions, towit, of calling the attention of the court to some matter which the court might have overlooked, or in regard to which the Court might have beeu misunderstood in the course of the charge, and thus give the court an opportunity while the jury were yet present, to correct such a mistake.

In *93rd U. S. page 46, Beaver vs. Taylor,* the court say,—

"2. An exception to the *entire charge* of the court or in " gross *to a series of propositions* therein contained cannot be " sustained if any portion thus excepted to is sound.

" 3. An exception "to such portions of a charge as are " variant from the requests made by a party not pointing out " the variances, cannot be sustained."

The court remark on page 55,

"It is not the duty of a judge at the Circuit Court, or of an " appellate court, to analyze and compare the requests and " the charge, to discover what are the portions thus excepted " to. One object of an exception is to call the attention of " the circuit judge to the precise point as to which it is sup- " posed he has erred, that he may then and there consider it, " and give new and different instructions to the jury, if in " his judgment it should be proper to do so."

Now the practice so disapproved is just what plaintiff in error has done in this case.

In the 32nd Ohio State 88, (*supra,*) the court say, in considering the exception to the charge, as follows:

"To the general charge of the court the defendant took "exception in this form; "To which general charge of the "court the defendant, by his counsel, at the time excepted, "and excepted also to each proposition of law therein con- "tained differing from the several specific charges asked by "defendant." This form of exception is clearly obnoxious to "the settled law upon this subject. It is not the duty of a "reviewing court to analyze and compare the requests, modi- "fications, and charge, to discover what particular portions "are intended to be excepted to."

5. The 5th point of error assigned by our learned adversary is to the overruling by the court of the defendant's requests to be given in charge to the jury.

It will appear from page 81 of the record that these requests consisted of a series of propositions, 14 in number, as printed, and the request as found on page 81 was in this language. "And thereupon the defendant requested the court to give in charge to the jury the following requests."

On page 83 it is recited

"At the close of these requests, which requests to charge "were refused by the court, except so far as covered by the "charge already given, to which refusal to charge the defend- "ant excepted."

When and where he accepted is not stated. If it is necessary for it to "affirmatively appear" that it wes taken at the time of the trial it should be so marked, as was ruled in the 102 U. S., 333, (*supra,*) but if it were recited here that the refusal of these requests were excepted to, the exception is a general one, and such general exception made to a refusal to chagre a series of propositions is held bad by the repeated decisions of this court, provided any one of the series is objectionable. *93 U. S., 26, Beaver vs. Taylor; 101 U. S., 149, Worthington vs. Mason; 103 U. S., 71, United States vs. Hough.*

Among the fourteen separate requests composing the series of our learned adversary which we consider objectionable, we call attention to the "7" and "8." The 7th reads:

"It is admitted by the pleadings in this case that after the "breaking of the shaft on Lake Huron, the tug was towed "to Port Huron and also to Detroit, both ports of safety. "This being so, if you find that the loss was occasioned by "unseaworthiness after leaving Detroit the defendant is en- "titled to your verdict—"

We contend that this request is manifestly objectionable; for it includes a loss that might have been caused by an unseaworthiness that arose wholly subsequent to the leaving of Detroit, and also includes a loss that did not "arise from" nor was "caused by" any of the perils excepted in the policy. It is manifestly too broad in its provisions. And the same is true of request No. "8."

6. This concerns the overruling of a motion for a new trial, the record of which motion, containing 12 specifications of error is found upon the 21st page of the record and the ruling of the court upon such motion is contained on page 23 in language following:—

Under date of 25th of March, 1886, a day of the above term, "this day came the parties, by their counsel, and came on to "be heard the defendant's motion to set aside the verdict of "the jury rendered herein at a former day of this term and "for a new trial of this case, which was argued by counsel, "and upon consideration it is ordered that said motion be "overruled; and thereupon, upon motion of the plaintiff it is "ordered and considered that the plaintiff, Patrick Smith, "have and recover from the defendant the sum of $7569.33 "etc."

We do not quote the entire entry, which concerns an order upon garnishees to appear and answer, but nowhere is there anything said to show an exception to the overruling of this motion for a new trial except that the entry at the close recites that "thereupon came defendant and *tendered its bill of "exceptions*, which is signed and sealed and ordered to be "made a part of the record in this case."

We suppose that this deficiency is enough to dispose of any error expected to be relied on by our learned adversary in regard to the overruling of this motion, and as the errors assigned chiefly concern matters that have already been considered in regard to the admission of testimony and the charge of the court, we forbear to repeat what we have already argued upon these several points.

The defendant below has undertaken by several exceptions taken and by an argument of considerable length in his brief, commencing upon page 28, to claim that the plaintiff had really in his petition no cause of action stated, or at least that his proof on the petition made no cause of action under the contract of insurance contained in the policy aforesaid, and the main line of his argument as we understand it now is, as it was upon the trial that after the shaft of the tug owned by the plaintiff below, Smith, had become broken, so that it was unable to navigate itself as a tug, it became *for all purposes unseaworthy*, and if the plaintiff took the said tug while in that condition past a port where he might have had her repaired, such conduct would prevent the recovery upon the policy, if she were lost while she continued in such unseaworthy condition, even though the loss did not arise from the break of the shaft so referred to.

The court below took a different, and as we contend the correct view of the case, that while such breaking of the shaft might render the tug unseaworthy for purposes of propelling herself and drawing other vessels, yet it was competent for the plaintiff to prove, as he claimed the fact to be, that he stopped up so far all leakage occuring around the broken shaft at the stern of the vessel, as would make her seaworthy to be towed and proceeded to bring the vessel to the port to which she was destined upon the trip she was then making, to-wit: Cleveland, Ohio, where he might have

her repaired by her owner, and the court iustructed the jury in substance that the permitting the tug to be towed in such condition down through the Detroit River, passed Port Huron and passed Detroit and on into Lake Erie, with the design to bring her home to Cleveland for repairs, would not of itself constitute such a breach of the policy or of the exceptions contained in the policy as would deprive the plaintiff below of his right to recover thereon ; that if the master in charge of said vessel, in the exercise of reasonable prudence and discretion, and after he had so far controlled the coming in of water at the place where the break of the shaft had occured as to render his vessel reasonably safe, at that time of the year, for undergoing the navigation proposed and in the form proposed of being towed by another steam vessel through to Cleveland, it would be proper for the jury to consider under all the evidence given to them, whether that condition of the vessel itself caused her ultimate loss, and if so, whether in bringing her past the first port where she might have been repaired, the master was guilty of incompetency or was guilty of such lack of ordinary care in the navigation of the vessel as brought the plaintiff within the exceptions contained in the policy.

This brings before this Honorable Court the interpretation of said policy, provided the exceptions taken by default below have been properly taken so that he can now avail himself of the same.

The ground assumed by our learned adversary, as we understand it, is that if a vessel becoming unseaworthy in the course of a voyage from any cause, fails to put into the first port where such unseaworthiness may be repaired, and goes past such port on her voyage, that unseaworthiness operates to release the insurer from any liability of loss, whether the loss results from such unseaworthiness or other-

wise. What might be the rule to be applied if we had no contract here would perhaps be a different question from what the rule is under our contract. At least we claim under our contract that the parties have provided for themselves what losses shall fall within the policy of insurance.

Upon page 5 of the record the policy reads that the insurance is:

"Touching the adventures and perils which the said "insurance company is content to bear and take upon itself "by this policy, they are of the lakes, rivers, canals, fires, "jettsons that shall come to the damage of the said vessel or "any part thereof, *excepting* all perils, losses, misfortunes, or "expenses consequent upon and *arising from or caused by* "the following or other legally excluded causes, viz: Damage "that may be done by the vessel hereby insured to any other "vessel or property; incompetency of the master, or insuf- "ficiency of the crew or *want of ordinary care and skill* "in navigating said vessel and in loading, stowing and "securing the cargo of said vessel; rottenness, inherent de- "fects, overloading, and all other unseaworthiness."

Together with various other exceptions that need not be enumerated because they do not concern the argument.

Now we understand from the proper interpretation to be put upon this clause, that the plaintiff below was insured under this policy against all perils and losses, except those consequent upon, "arising from" or "caused by" certain excepted causes, among which were "incompetency of the master," "want of ordinary care or skill in navagating the vessel," "rottenness," "inherent defects," or "any other unseaworthiness. It is not made a ground of release from all liability on part of the Insurance Company if any of these excepted conditions exist, but a release is provided from such cases as are "caused by," or "arise from" any of these specified causes.

If this be the true construction, then if this vessel received a peril of the lake and sustained loss which was not caused by or did not arise from one of these excepted forces or

causes, we would still be entitled to our recovery, and therefore the question came and was presented to the jury and argued to them upon this ground, that although the shaft of the vessel had been broken after the vessel left the port of L'Anse, and while she was upon Lake Huron, about 70 miles out from Port Huron, yet in-as-much as the master had succeeded at the time in so stopping up the leak which came in around the shaft, that he substantially controlled that leak, and had it so completely under his control that he was able to take the vessel in tow, and by very slight means of pumping keep her free from all water that came through the said leak, and after reaching the port of Huron and finding that he had this leak entirely under his control, continued on his course down to Detroit for a day, and finding still that he had entire control of it and was not suffering any danger or disaster from the leak, but had it entirely under his control proceeded to come on across Lake Erie, with a design and intention to reach his home port, where the owner might put his vessel in repair; and in so doing he acted with ordinary care. The question was submitted under the opinion of numerous experts approving such course. Did the master act with ordinary care? And the question came, at the time when the vessel began to fill with water upon Lake Erie whether this filling of water was caused by the aforesaid breaking of her shaft or from some other peril; and upon this point the testimony of the master, who made particular examination at this time, was clear and distinct to the jury, that the leak that had existed at the time of the break of the shaft and had been stopped up by him *remained stopped up* and in good order at the time the water was found coming into the vessel, (record, page 28.) Therewas also the further testimony of one of the crew, George Ellis, Jr., who was a deck hand on the Sprague at the time of her sinking and was engaged in passing

coal from her bows back to the fireman, and who said distinctly that about one o'clock when he was in there shoveling coal he noticed the water coming in under the coal which was at the bow of the boat, which was entirely removed from the source of leak connected with the break of the wheel, which was at the stern of the boat. (Record, page 45 and 46.)

In this view of the case and of the further testimony of W. H. McNillie (Record p. 72) that was submitted to the jury; that logs coming from rafts and other sources were frequently drifting about the mouth of the Detroit River; it was submitted to the jury whether that did not sufficiently account for some hurt or injury that the vessel had received; or possibly whether it may have been from the straining upon such waves, as appears from the testimony of several of the witnesses, were encountered after they reached Lake Erie. From the testimony of the master and others of the crew it appeared that when they were out 20 or 30 miles from the mouth of Detroit River they encountered a "pretty good sea" (Record p. 29 and 37) and from the testimony of Sargeant Line of the Signal Service, called by the defendant below, it was shown that on the evening of July 22nd the storm signal was hoisted at Cleveland, at 6:20 p. m. and the wind on the 23d July, at 7 a. m. was 20 miles per hour.

We do not understand the law to impose a duty upon an insured person to be able to discover in the darkness of night, just what is the cause that creates such leak in his vessel as puts it beyond his power to control the same. It is enough if the party show some probable cause to have existed which will account for the disaster, and this we claim was shown by the testimony given in regard to the waves encountered at that time, and the liability to encounter logs at that part of the lake, coupled with the testimony that the water which

caused the sinking of the vessel came in from her bows and not from the stern.

The Supreme Court of Ohio in *32 O. S. 92* Ins. Co. *vs.* Tobin say, in considering a case very like to this.

"The insured may not be able, and is not required in such "case to show the *exact cause* of the loss, but may introduce "evidence tending to show a *probable* or even *possible* cause "for the loss."

We argued the case on this doctrine; but if the contract is not to be interpreted so as to sustain us in this position, if the question had been left without any provisions in the contract, especially made in regard to unseaworthiness, yet we claim the law to be such as to make it sufficient for the plaintiff to show that the loss arose from other cause than the unseaworthiness which he admits to have existed in the vessel, arising from her broken shaft.

The learned counsel for plaintiff in error has udnertaken to suggest in his argument that because the boat was over 20 years of age, she will be presumed to have died a natural death; but the pleadings establish the fact that at the time she left the port of L'Anse she was "stout, staunch and strong, and in all respects seaworthy for the voyage she was about to undertake," for that averment was contained regarding her character and condition in the plaintiff's petition and the answer of the defendant says that "it *admits* the *character* and general occupation of the tug," and the court construed that admission as properly covering the aforesaid averment of the petition, so the question came to what extent, if at all, did the tug become unseaworthy, by reason of the breaking of her shaft. For the purpose of propelling herself as a tug; she was admitted unseaworthy yet it was claimed in behalf of the plaintiff below and that claim was sustained, as we insist, by the testimony of all the experts called in the

case, that when she had properly controlled the leak at the point where the break occurred and got the same so under control that by a very slight pumping power she was enabled to keep herself clear of water, it was within the scope of good seamanship to put her in tow and she was *not unseaworthy* then for *being towed by another tug past Port Huron down Detroit River, past Detroit and on her course to her Cleveland home,* and that her master in the exercise of ordinary care and skill as a seaman was justified in the course so determined on by him.

The principal authority adduced by us as showing the law in regard to the unseaworthiness of vessels and losses resulting therefrom, is contained in the 20th Wendell, 287, The American Ins. Co. vs. Ogden & McCoe, the syllabus of which is as follows:

"In the insurance of a vessel on time, the warranty of sea-
"worthiness is complied with if the vessel be in an unexcep-
"tional condition at the commencement of the risk, and the
"fact that she subsequently sustained damage and was not
"properly refitted at an intermediate port, does not discharge
"the insurer from subsequent risk or loss, provided such loss
"be not the *consequence* of the omission.

"A defect of sea-worthiness, arising after the commence-
"ment of the risk, and permitted to continue from *bad* faith
"or *want of ordinary prudence* or *diligence* on the part of
"the owner or his agents, discharges the underwriter from
"liability for any loss, *the consequence of such want of faith,*
"*prudence* or *diligence;* but *does not affect* the contract of
"insurance as to any other risk or loss covered by the policy,
"and *not caused* or *increased by* such *particular defect.*"

The same doctrine is sustained by the *3rd Serg. and Rawle 25, Peters vs The Phoenix Ins. Co.; 11th Pickering 227, Paddock vs The Franklyn Ins. Co.; 19th Pickering 198, Starbuck vs New England Ins. Co.; Tawney's decisions, 126, Adderly vs The American Ins. Co.,* and as we understand the cases cited by our learned adversary in support of the position which he contends for, we understand them all to con-

tain this same qualification that we have above specified, to-wit, that unless the unseaworthiness existing in some particular, *causes* or *produces the loss,* it shall *not be in the way of recovery arising from some other cause.*

For example, the case cited by him from 2nd Metcalf, 432, contains this remark, among other things, "It is the duty of the assured from time to time during the voyage to repair her and keep her in suitable condition for the service in which she is engaged and if they fail to do so and a loss happens *which is attributable to that cause,* the assured and not the underwriters must sustain it."

A similar remark is contained in the opinion cited by counsel from the 12th Cushing 157, Capen vs. The Washington Insurance Co., and the same condition is inserted in substance in the case cited in 6th Wisconsin 670, Merchants Mutual Insurance Co. vs. Sweet. So the case from 1st Sumner 218, Hazzard vs. New England Insurance Co., while it declares the duty of the master after the vessel is rendered unseaworthy, to have her repaired, adds, "if the master having made a port where such damage might be repaired, neglects to have the same repaired and the vessel is afterwards lost in consequence of such unseaworthiness, though the proximate cause of the loss be a peril of the sea, yet the ultimate and effective cause of the loss is the neglect of the master to make the repairs, which would have prevented it, the insurer is not liable; *otherwise if the loss happens from any other cause than such unseaworthiness.*"

Among other things the court said to the jury, page 78 of the record:

"The Sprague having been temporarily repaired by calk-
"ing the leakage occasioned by the breaking of her shaft and
"taken in tow by the Wilcox and in safety having reached
"Detroit, the question presents itself to the duty of the
"master of the plaintiff to have the proper repairs made

"there before starting on Lake Erie for her home port on "Lake Erie, and, failing to do so, how does it effect the plain- "tiff's right to recover on this policy. On this point I direct "you that if when the Sprague arrived at Detroit the breaking "of the shaft and the consequent leakage therefrom was such "that an ordinary prudent and discreet master of competent "skill and judgment would have deemed it necessary to repair "the vessel so as to stop the leak before proceeding on the "voyage to Cleveland, and you find that the sinking of the "vessel and its loss was occasioned by his omission to do so, "and would not otherwise have happened, then the plaintiff "is not entitled to recover in this suit. But if you find from "the character of the injury and the leak that a master of "competent skill and judgment might reasonably have sup- "posed in the exercise of ordinary care for the safety of the "vessel, that she was seaworthy for the voyage in which she "was then engaged, in the manner that she was to make the "trip to Cleveland in tow of the Wilcox, notwithstanding "the leakage occasioned by such breaking of the shaft, and "on that account ommitted to make such repair at Detroit, "then such omission to make such repair at Detroit is no bar "to a recovery in this suit."

The learned counsel for the plaintiff in error have argued at considerable length for the release of the Insurance Company in this case because the vessel was an old vessel rather than a new one. It appears from the policy itself that the rate per cent of insurance charged this vessel during the season was 6.85 per cent upon the amount insured. This high rate would of course indicate that she was understood by the insurer not to be a first-class risk, and taken in connection with the testimony of William Scott, who was the agent of the Insurance Company at Cleveland for the taking of risks in their behalf, which is found on page 52 of the record, and is to the effect that the underwriters engaged in taking insurance at the port of Cleveland, employed a man to go round in the spring to find out the condition of the various tugs and other craft here for the sake of rating them, with a view to determine the rate of insurance to be paid, would warrant the jury in the conclusion that the

insurers well understood that they were not insuring a first-class risk and charged the plaintiff below accordingly, as they considered his risk greater than that of ordinary craft, and when that is taken in connection with the averment of the petition that she was "stout and staunch and in seaworthy condition at the beginning of the voyage in question which the answer admits we think that the suggestion that she was too old to maintain an action under her policy comes with very poor grace and is not sustained by the evidence itself.

There is some argument also based on the fact that one of the witnesses testified that he found the hull of the Sprague, at one point in her "run," *soft*. We understand this to be the part of the vessel which narrows towards her stern, and is about at the point of connection between wind and water, and it is a matter of such common observation that wood situated in such a locality, exposed to both air and water by turns, will become rotten sooner than it will if it be kept entirely under water or entirely in the air, that we think the argument is rather strained to reach the conclusion that there was such rottenness in this case *as caused* the loss of this vessel, especially where the testimony of witnesses shows that the water causing her to sink did not come in the vessel at the point where this witness found the *softness* in the woodwork. He does not say it was "in the timbers," as counsel quote it, but the water came from the other remote end of the vessel, which caused the loss, as appears by the direct testimony of the witnesses, and even if there were rottenness in parts of the vessel, as laid down, yet if it did not cause the leakage which resulted in her loss, it would not be within the exception made by the policy, and the Insurance Company would still be bound to pay its loss.

It occurs to us that a word further may be proper in answer to the argument of our learned adversary on page 68 of his brief, concerning the refusal of the Court to allow a witness to answer what he heard the captain of the Sprague say in regard to the leak *after* it occurred. There is an utter want of any disclosure what would have been the testimony if it had been permitted to be given. This is enough to dispose of that alleged error, but further the statement of an agent made *after the act* concerning it is no part of the *res gestae*. 119 U. S. 103, Vicksburg Railroad Co. vs. O'Brien.

If your Honors should conclude that the exceptions of the defendant below to portions of the charge of the Court as designated on record. page 77, are sufficiently definite to authorize a revision of such charge, then we desire to notice very briefly a point (9) ot page 78 of the brief of our learned adversary. He contends that the Court below improperly put on defendant the burden of proof of a particular act of negligence alleged by defendant to have been performed by plaintiff.

The matter arose in this manner. The Court had charged in general (page 77 record).

"To entitle the plaintiff to recover he must show that he "has complied with the terms of the policy. * * * * "and it must appear from the whole proof that the loss was "not occasioned by the want of ordinary care of the master "in charge of the vessel or on account of being unseaworthy, "etc."

Defendant had undertaken by his expert evidence (page 68) to prove that the master failed to exercise ordinary care when he discovered the water gaining on his pumps in Lake Erie, because he did not require the tug Wilcox to tow him back to the Detroit River, and the Court by its charge as found on page 80 of record, refers to this special contention of counsel for the defendant below in regard to the evidence.

We submit that in this view the learned Judge of the Circuit Court was correct. The Supreme Court of Ohio in 24 O. S., 636, Railroad Co. vs. Crawford says:

"There is no presumption of negligence as against either "party, except such as arises from the facts proved. Indeed "the presumption of law is that neither party was guilty of "negligence and such presumption must prevail until over-"come by proof."

While we have not argued in detail each point which our learned adversary has referred to in his brief, we have designed to cover, and think we have covered all those matters in which he seems seriously to attack our judgment, and perhaps some where his sincerity of complaint might be questioned, and we think he fails to show any good ground for disturbing our judgment.

All which is respectfully submitted.

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